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CRIMINAL PROCEDURE CODE, 1898.

The new Criminal Procedure Code, though in form a numerically distinct Act, is in substance the Code of 1882, largely amended. Many of the new provisions are indeed of a controversial character, but we propose, within the limited scope of this article, to deal only with the salient portions of the Code.

Section 21 (1) *e*, & (2). Outside the Presidency Towns certain Magistrates are put under subjection "to the general control of the District Magistrate," *see* S. 17 (2). The expression is quite indefinite, and gives the District Magistrate rather large powers. The present section confers on the Chief Presidency Magistrate the same powers of "general control" over the Presidency Magistrates declared by the Local Government subordinate to the Chief, but such powers are to be exercised only within the area and extent of subordination defined by the Local Government. This section, we submit, does not, as was misapprehended, imply appellate or revisional jurisdiction, but merely disciplinary and advisory powers, and as such seems a salutary enactment as a corrective to the erratic tendencies of some of the honorary and stipendiary solons who preside in Presidency Courts.

Section 107 (2). This section creates an extension of the present jurisdiction of Presidency and District Magistrates, and entails a curtailment of that of Sub-divisional and First Class Magistrates, and according to S. 107, of the present Code, Presidency and District Magistrates can call upon persons only resident within the limits of their jurisdiction to furnish security, but possess no power over persons resident outside the same, though the contemplated breach of the peace may be within their limits of jurisdiction (*Re Jai Prakash Lal*, I. L. R., 6 A., 26; *Re*

Rajendro Chunder Roy, Ib. 11 C., 737; *Re Dinonath Mullick, Ib.* 12 C., 133; *Re Abdul Aziz, Ib.* 11 A., 49). Under the new Code such Magistrates will have jurisdiction even in the case of persons resident beyond. So that a man resident in Busar may be called upon to show cause in Calcutta, if the Court thinks a breach of the peace likely here. This section will afford considerable scope for the harassment and annoyance of persons living at a distance, and is, therefore, extremely dangerous in character. However, as a compensation, the new section gives Sub-divisional and First Class Magistrates power only when the person and the place of contemplated breach of the peace are both within their jurisdiction. When a person is within, but the place is without, the jurisdiction, such Magistrates have no power to act, but must send up the case under clause (3) to the District Magistrate.

Section 108. This section is of a far-reaching character, and may, we are afraid, be employed as an engine of oppression in the hands of the mofussil magistracy. What might be construed to be an "*attempt to disseminate*" may well cause us alarm and apprehension. It involves also the construction of sections (124-A and 153-A) by *magistrates* which have much exercised the minds of *High Court Judges* with their superior legal training. Clause (c) will prevent mofussil papers from bringing to light cases of local, judicial and executive vagaries. In many cases the very officer aimed at, or his superior or subordinate, may at the same time be the presiding Magistrate. The accused cannot object to the Magistrate under S. 556, which is limited to "inquiries" and "trials," and not to proceedings under Chap. VIII. He may possibly apply under S. 526 for a transfer of the case, though it is not quite clear; whether for the purposes of the section, he can be termed an "accused," or whether proceedings under Chap. VIII come within the definition of "criminal case.' It may well be, the courts would construe the latter phrase to mean the "inquiry or trial" alluded to in clause (a), and in this case, the remedy under S. 526 would be closed to him. The safeguard provided for in S. 108, para. 2, applies only to editors and printers, and would not protect others from proceedings under the section without such sanction. An appeal from an order under Ss. 108 and 118 lies to the District Magistrate (*see* S. 406), and the unfortunate person fares no better. S. 108 is out of place in chapter VIII which

deals with the *prevention* of offences not yet accomplished. S. 108 implies the actual commission of offences under Ss. 124-A, 153-A, 499 and 503, in respect of which proceedings under the Penal Code may be taken. The section, instead of preventing the commission of an offence, provides a new and milder punishment for these offences concurrently with the penalties in the Penal Code.

Section 162* A point of the greatest moment to the accused is involved in this section. Under the Act of 1882, S. 162, it has been held by the Calcutta High Court that the accused has the right of inspection of statements recorded under S. 162, even if entered in the diary under S. 172 (*Mahomed Ali Hadji* v. *Queen-Empress*, I. L. R., 16 C., 612; *Bikao Khan* v. *Queen-Empress, Ib.* 610; *Sheru Sha* v. *Queen-Empress, Ib.* 20 C., 642), if he calls for them in proper time. The right of the accused to a copy of such statements has not been expressly mentioned in these rulings, but such right is incedental to the right of inspection. Under S. 94 of the Criminal Procedure Code and S. 165 of the Evidence Act, the Court can always call for any documents at its discretion. The new section makes it compulsory on the part of the court to call for and inspect the written statement itself; so far it is open to no objection, but it leaves it to the court's discretion to allow copy of the statements to the accused. It is not clear whether the section prohibits the accused only from obtaining a copy, or even from inspection, except with the permission of the court. If it implies right of inspection, but denial of a copy unless allowed by the Court, the accused is not seriously hampered in his defence: if, however, the section prevents the right of inspection by the accused altogether, and makes the obtaining of a copy discretionary with the court, the new section places the accused in a worse position than he is at present under the Calcutta rulings. We submit that the court ought to exercise its discretion judicially in the matter of giving copies, and that whenever there are *material* discrepancies between the statements and the evidence in court, it ought to allow the accused a copy. The Court in refusing a copy is bound to state in its order sufficient materials to enable the High Court in revision to decide whether the discretion has been judicially exercised (*In the matter of the petition of Panjab Singh see* I. L. R., 6 C., 579);

* See the Article "Police Diaries" by the writer, in the first volume of the *Calcutta Weekly Notes*, p. cclxxvii.

and we are confident that the High Courts will see that no injustice has been done to the accused in this matter.

Section 191. If a Magistrate takes cognizance of an offence under S. 190 (c), and the accused objects to being tried by him, the Court may commit the accused to the Sessions. This is startling. As the section is worded, there is no indication as to what classes of cases is to be committed, nor is any procedure mentioned. But it could not have been intended to leave these matters to the discretion of the Court, and we think the provisions of Chapter XVIII must be taken to apply, and that the committal must be in accordance therewith. This section makes a committal compulsory and does not allow the Magistrate power to discharge the accused under sections 209, 213: whereas if the case were transferred to another Magistrate, the accused could legally be discharged.

Section 202. The alterations in the new section imply a shade of doubt less than distrust. The section is, however, practically the same as the existing one. Magistrates have no time on the Bench to enter into philosophical examinations of their states of mind so as to decide whether they are not *satisfied as to the truth* of a complaint, or whether they *distrust the truth* of it. It would have been better in such cases, instead of calling for a police inquiry, which is largely influenced by pecuniary considerations offered by one or both parties, to have allowed the issue of a notice on the accused to show cause why process should not issue—a procedure often adopted in practice, though its legality is doubtful.

Section 208 (2). This clause has been added owing to the difficulties expressed in the argument in *Queen-Empress* v. *Sagal*, I. L. R., 21 C., 642.

Section 213 (2). This is an important and salutary addition to the Code. The charge may be cancelled if the fresh evidence shows it to be erroneous or unsustainable.

Sections 252, 254, 256, 257. The procedure in warrant cases is much altered by these sections. Sections 252 and 254 must be read together to avoid inconsistency, and enact that the Magistrate is not bound to examine all the prosecution witnesses before framing a charge (as he must under the Code of 1882), but only as many as he thinks sufficient to prove a *primâ facie* case for the

purpose of drawing up a charge. The remaining prosecution witnesses are to be examined after the charge as laid down in the new section 256. This is a very important alteration of the existing law. Another material variation from the Code of 1882, though whether it was actually contemplated is doubtful, is that the accused may have *three* cross-examinations; one under S. 252, according to the case of *Queen-Empress* v. *Sagal*, I. L. R., 21 C., 642; another under S. 256; and a third under S. 257, provided, of course, in the last case, the Magistrate considers that the application for process against the prosecution witnesses is not for the purpose of vexation or delay or for defeating the ends of justice, and provided further that the Magistrate "is satisfied that it is necessary for the purposes of justice." It is possible to conceive of cases where the third cross-examination under S. 257 would be conducive of justice, especially in the case of the prosecution witnesses examined under S. 256 after the charge, but in many cases such cross-examination will be productive of no substantial benefit to the accused, and the Court should see that the section is not abused.

Section 292. Under Act X of 1882 the right of reply depends on the statement of the accused that he "means to adduce evidence," and hence, if he states he does not mean to do so, then, notwithstanding the fact of the defence counsel having tendered in evidence during cross-examination certain documents, the prosecutor has no reply (*Queen-Empress* v. *Grees Chunder Banerjee*, I. L. R., 10 C., 1024, *see* also *Empress of Indian* v. *Kaliprosonno Doss*, I. L. R., 14 C., 245, *Queen-Empress* v. *Solomon*, *Ib.*, 17 C., 930, and *Queen-Empress* v. *Krishnaji*, I. L. R., 14 B., 436: *see contra*, *Queen-Empress* v. *Venkatapathi*, *Ib.*, 11 M., 339; *Queen-Empress* v. *Hayfield*, *Ib.*, 14 A., 212). The new section gives a right of reply if the accused has in fact "adduced any evidence." This seems to follow the rule in the Madras and Allahabad cases and to over-rule the Calcutta and Bombay decisions.

Section 406. It is much to be regretted that, at least in the case of orders passed under Ss. 108 and 118, the appeal has not been directed to lie to the High Court instead of the District Magistrate. Where the order has been passed by the District Magistrate himself, it is final.

Section 435 (4). This avoids the unseemly spectacle of one officer exercising jurisdiction when the other has refused to do so.

Section 437. As one of the main objects of the recasting of the Code was to elucidate doubtful matters it might have been expected that certain points in connection with the section should have been expressly mentioned. The question of notice to the accused is passed over. The rulings in *Chundi Churn* v. *Hem Chunder*, I. L. R., 10 C., 207; *Nobin Kristo* v. *Russick Lall, Ib.*, 268; *Darsun Lall* v. *Jumuk Lall, Ib.*, 12 C., 522; *Hari Doss Sanyal* v. *Saritulla, Ib.*, 15 C., 608; *Queen-Empress* v. *Maniruddin Mundul, Ib.*, 18 C., 75; *Queen-Empress* v. *Errcmreddi, Ib.*, 8 M., 296; *Queen-Empress* v. *Amir Khan, Ib.*, 336; *Queen-Empress* v. *Hasnu, Ib.*, 6 A., 367; *Queen-Empress* v. *Choru, Ib.*, 9 A., 52; and *Queen-Empress* v. *Dorabji Hormasji, Ib.* 10 B., 131, may, however, be taken as still conclusive of the point. The question whether an order under the section could be passed upon the same or further materials is also not answered, and hence the decisions in *Hari Doss Sanyal* v. *Saritulla, Ib.*, 15 C., 608; I. L. R., 10 B., 131; I. L. R., 9 A., 52, and *Queen-Empress* v. *Balasinnadambi*, 14 M., 334, must be looked to for the solution. The exact scope of the words "into the case of any accused person who has been discharged" is not understood apparently by the lower revisional courts, and has led to rulings laying down that they have no power to order further inquiry in cases of orders passed under S. 133. *Srinath Roy* v. *Ainaddi Halder, Ib.*, 24 C., 395, or under S. 145, *Chathu Rai* v. *Niranjan Rai, Ib.*, 20 C., 729. Owing to the meaning of the word "accused" given in *Queen-Empress* v. *Mora Puna*, I. L. R., 16 B., 661, and followed in I. L. R., 23 C., 493, it may appear that orders under Ss. 188, 488 can be revised under S. 437, but such is not the intent of the above expression. It would have been far better if the words "under Ss. 209, 213, 253" had been added after the word "discharged."

Section 439 (5). This clause only bars the accused from applying to the High Court *before* and not *after* the appeal. It was strongly objected to at the time the Bill was discussed, but it is in reality another form of the rule laid down in *Queen-Empress* v. *Reolah*, I. L. R., 14 C., 887, and *Queen-Empress* v. *Chagan*, I. L. R., 14 B., 331.

Section 503 (1). The doubt expressed in *Hem Coomaree Dossee* v. *Queen-Empress*, I L. R., 24 C., 551, whether Presidency Magis-

trates have power to issue commissions in respect of witnesses resident within their jurisdiction is still left open.

Section 517 *and explanation.*—S. 517 sets at rest to a certain extent the vexed question as to the power of the Court to deal with property before it when the accused is discharged or acquitted—See *Queen-Empress* v. *Fattah Chand,* I. L. R., 24 C., 499; *Re Mate Ghosh,* 1 C., W. N. 561—but the explanation limits the definition of "property" therein contained to property regarding which an offence appears to have been committed. So that if an accused has been discharged or acquitted, and the property before the Court has been converted into or exchanged for other property, the Court will be in the same difficulty as before. S. 517 read with the explanation will only empower the Court to deal, on discharge or acquittal, with property which remains in its original state. It may be that by an oversight the wording of the explanation was not altered to correspond with the alteration in the section.

Section 526 (8). It is a matter of great satisfaction that the clause remains as it stands in the present Code, without the objectionable restriction introduced into the Bill.

Section 533. The word "any" cannot mean "all," and the section, even as it stands, will not render a confession admissible where no attempt has been made to conform to Ss. 164, 364 (*Queen-Empress* v. *Viran,* I. L. R., 9 M., 224). It was intended by the change of language to bring within the scope of the section the case where a confession is not recorded in the language in which it was made, though it was practicable for the Magistrate to have done so. The point has not yet been finally decided by any High Court. The cases of *Queen-Empress* v. *Nilmadhub Mitter,* I. L. R., 15 C., 595; *Jai Narayan* v. *Queen-Empress,* I. L. R., 17 C., 862, are one way, while *Lalchand* v. *Queen-Empress,* I. L. R., 18 C., 549, is the other way; and *Queen-Empress* v. *Sagal,* I. L. R., 21 C., 642, is indecisive. Whether the result aimed at by the alteration of the section has been achieved is another matter. The words "duly made" are still retained, and it may be argued, as in I. L. R., 17 C., 862, that they show that the defects aimed at in S. 533 refer only to signatures and certificates.

Section 537, *Explanation.* The explanation is a grave restriction upon the power of the High Court. If the irregularity could have been objected to in the earlier stages of the case, then the Court is not to interfere, notwithstanding a clear failure of justice. As objection may always be taken to the irregularities mentioned in the section during the progress of the case in the Court below, except perhaps where there is an irregularity in the judgment itself, or misdirection to the jury, the explanation would shut out the majority of cases that would otherwise fall within the section. The explanation will, no doubt, be strictly construed in favor of the accused. Where an accused is undefended or not represented by a skilled pleader, it would be extremely unjust to hold that the finding cannot be reversed, because objection could legally have been taken at an earlier stage.

Section 540. It will be noticed that Chapters XX and XXI are silent as to the *right* of the prosecution to interpose witnesses or offer documentary evidence after the prosecution has closed, in order to explain, or rebut oral or documentary evidence adduced by the defence, or to corroborate a prosecution witness on matters which arose in cross-examination after charge and which could not have been dealt with in the examination-in-chief. Under S. 9 of the Evidence Act, facts explaining or rebutting inference from facts in issue are relevant and the section appears to allow the prosecution the right to tender oral and documentary evidence for the purpose. Under S. 54 the prosecution is entitled to prove bad character after the charge. S. 145 applies to cross-examination and contradiction of defence witnesses, also (*Re Tupsee Koer,* 15 W. R Cr. 23). Under S. 153 certain evidence in contradiction of defence witness is open to the prosecution. The credit of a defence witness is liable to be impeached under S. 155. Then S. 157 would apparently allow corroborative evidence of prosecution witness, with perhaps the limitation in practice that such evidence could not have been given in the examination-in-chief. Though the Evidence Act gives a right to the prosecution to adduce oral and documentary evidence after charge, the Code makes no express provision for this case. Possibly the prosecution could apply for process to compel the appearance of witnesses or the production of documents, but the Court may also certainly be moved under S. 540, Cr. P. C., and S. 135, Evidence Act, to summon witnesses

and under S. 165, Evidence Act, to order production of documents. As to the rulings, it has been held that prosecution witnesses could be called after the defence has begun to contradict a new case set out by the accused—*see Queen* v. *Sham Kishore Holdan*, 13 W. R. 36; *Queen* v. *Chotey Lal*, 3 N. W. P. 271. The Court may record oral and documentary evidence after the charge: *Empress of India* v. *Baldeo Sahai*, I. L. R., 2 A., 253; *Queen* v. *Kassy Singh*, 21 W. R., 61; *In the matter of Ananda Chunder Singh* v. *Basu Mudh*, I. L. R., 24 C., 167. It is the duty of the Court to call material prosecution witnesses even after the case is closed—23 W. R. 67. The rule in civil cases is the subject of decision in *Kazi Gulam* v. *Aga Khan*, 6 B. H. C. R., O. C. 93, and *Khadijah* v. *Abdool Kurreem*, I. L. R., 17 C., 344.

Section 562 is a tardy recognition of a principle well established in England. It is one of the wisest features of the new Code; but being a provision hitherto entirely unknown to Indian law may not be properly understood at first by the lower ranks of the magistracy.

Section 565 will give the police an excellent opportunity for levying blackmail from an unfortunate released convict. The rules to be framed under clause 3 will, we hope, be founded on a consideration of this fact.

Schedule II, 124-*A*. Offences under S. 124-A will be triable by Presidency Magistrates, District Magistrates, and even specially empowered First Class Magistrates. This provision, it is true, has the advantage of avoiding giving petty editors an undeserved notoriety, but it also removes what would otherwise have acted as a practical check upon the Government in instituting proceedings unless it had a good case. The safeguard arising from trial by Jury no longer exists. An editor may now be quietly arrested, put up before a First Class Magistrate, and laid by the heels without any fuss or bother, and sent to rusticate for a few months in one of Her Majesty's jails.

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HINDU LAW—SUCCESSION UNDER THE MITAKSHARA TO WOMAN'S PROPERTY INHERITED FROM A FEMALE.

There is, perhaps, in the Hindu Law no subject which is involved in greater obscurity or beset with greater difficulties than the law relating to the devolution of *stridhanam*. It has now become settled law, that property inherited by a woman from a male owner does not class as her *stridhanam* and is not transmissible to her heirs. Her succession itself is regarded as a case of interposition, and after her death the property descends to the heirs of the last male holder. But it is by no means free from doubt, whether a woman's property inherited from a female does not constitute her *stridhanam* or peculiar property and is not transmissible as such in the line of her own heirs. In this article we propose to examine this question and try to indicate what appears to be the law under the Mitakshara.

In *Buchiraju* v. *Venkatappadu*, 2 M. H. C. R., 402, and *Narasayya* v. *Venkayya*, 2 M. L. J., 149, the Madras High Court appears to take the view that property inherited by a woman from a female will constitute the *stridhanam* of the inheriting woman and will pass to her own heirs. But in *Sengamalathammal* v. *Velayuda Mudali*, 3 M. H. C. R., 312, it was distinctly ruled that property to which a woman succeeds as heir of another woman does not become the successor's *stridhanam* or absolute property. This latter view has also been affirmed in two later cases: *Virasangappa* v. *Rudrappa*, I. L. R., 19 M., 110, and *Venkataramakrishna Rau* v. *Bhujanga Rau*, *Ib.* 107. In this state of conflict, it is extremely desirable to examine the question with some minuteness.

Under the Hindu Law, the legal incidents attaching to *stridhanam* property are these. In such property, the woman takes an absolute estate. The second incident of *stridhanam* property is that it devolves according to a special line of descent. The woman becomes a fresh stock of descent and transmits the property to her own heirs.

It is thus seen that the answer to the question now under discussion is really involved in the answer to the question, whether a female takes a qualified or a full estate in the property acquired by inheritance from another female? If the proper view is that

she takes but a qualified heritage, then her succession will amount to a case of interposition between the last full female owner and that owner's heirs; and it will logically follow that the further devolution of the property will be in the line of the full owner's own heirs. If, on the other hand, the proper view is that the inheriting female takes an absolute estate, then she must be deemed to constitute a fresh stock of descent and to be capable of transmitting the property to her own heirs as laid down in the Mitakshara. Indeed the decisions of the courts do all proceed upon this view, namely, that the special rules of descent laid down with respect to woman's peculiar property cannot apply to cases where a woman can be held to have taken only a qualified estate. In short, the two aforesaid legal incidents of *stridhanam* property do always co-exist, so that the one cannot be said to exist in the absence of the other.

The Mitakshara which is the ruling authority in Southern India deals with the laws of succession in Chapter II. In sections I to VII of that Chapter, Vijnanesvara, lays down the rules of succession which are applicable to the property of a male owner and which regulate its devolution after his death. Under the law thus laid down a man's property passes at his death, first to his male issue (*i.e.*, son, grandson and great grandson), and then successively to widow, daughter, daughter's son, mother, father, and so on, each of them taking in default of the previously mentioned heirs. In section XI of that Chapter, Vijnanesvara treats of succession to woman's separate property or *stridhanam* and lays down special lines of descent as regulating the devolution. With respect to a maiden's property, he marks out a special line of descent (*placitum* 30.) As regards all the properties of a married woman excepting her *sulka* (*placitum* 14), he lays down one uniform course of descent (*placitum* 8-13 and 15-25). According to Vijnanesvara, a married woman's property (except *sulka*) will go first to the daughters (*placitum* 2-13), then to the daughter's daughter (*placitum* 157), then to the daughter's son (*placitum* 18), then to the son (*placitum* 19), and then to the grandson (*placitum* 24.) In default of all these, the property will pass either to the husband, and in default of him to his nearest *sapindas* if her marriage was in an approved form or to her mother, father, &c., if her marriage was in an unapproved form (*placitum*) 25; 8-11. It is thus seen that in

the rules of succession relating to a man's property, we find females in the line of heirs; and that in the rules of succession relating to a woman's property, we also find males in the line of heirs.

With respect to property inherited by a male, whether from a male or female, it has never been doubted that the successor takes an absolute heritage. It is only in the case of property inherited by a woman, there is room for doubt and discussion. Does she take an absolute estate, or only a qualified estate in such property? In *placitum* 2 of section XI, the Mitakshara classes as *stridhanam*, not only those properties that are specifically mentioned as such by Manu, Yajnavalkya and others, but also property acquired by a woman by inheritance. *Prima facie* then, this part of the Mitakshara leads to the supposition that a woman takes an absolute estate in the property she inherits (whether from a male or a female) and that the further devolution of such property will be governed by section XI of the Mitakshara and will be in the line of the woman's own heirs as laid down in that section. The course of judicial opinion on the question of the devolution of the inherited property of a woman appears to have been somewhat curious. On the strength of the Mitakshara definition of *stridhanam*, it was at first contended that all the inherited property of a woman (whether from a male or a female) would become her absolute property and would pass in the line of the successor's own heirs. This contention was put forward but overruled by the Privy Council in several cases all relating to property inherited by women from males; and there has been till now no decision of that august tribunal with respect to *stridhanam* inherited from a female. The contention was refuted first with respect to immoveable property inherited by a widow from her husband (*Mussumut Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A., 139); then with respect to moveable property inherited by a widow (*Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A., 487); then with respect to property inherited by a daughter from her father (*Chotai Lall* v. *Chunnoo Lall*, 6 I. A., 15; and also I. L. R., 4 C. 744). In all these cases "it was held that the woman took only a restricted interest and that on her death the property devolved on the line of the last male owner." The above cases were again re-affirmed and

followed by the Privy Council in *Muthu Vaduganatha Tevar* v. *Dorasinga Tevar*, I. L. R., 3 M. 290. And this principle of a limited estate being taken by a woman inheriting to a male owner was naturally extended to the case of all other female heirs, such as mother, sister, &c. It thus became settled law that property inherited by a woman from a male does not class as *stridhanam* proper and does not descend as such. This is the undoubted law at the present day in Southern India and in all other places governed by the Mitakshara except the Bombay Presidency.

But is there any warrant for supposing that the devolution of *stridhanam* inherited from a female is not governed by the special course of descent laid down in section XI of the Mitakshara? The tendency at present seems to be in favor of the other extreme view that no portion of the inherited *stridhanam* of a woman descends as such or is transmissible to her own heirs. The assumption is readily made that because the Privy Council have laid down that section II of the Mitakshara does not apply to property inherited from a male, the section is equally inapplicable to the case of *stridhanam* inherited from a female. The correctness of the assumption will, no doubt, depend upon the answer to the question whether the Privy Council rulings cited above proceed upon grounds applicable equally to all cases of inherited *stridhanam* or only upon grounds peculiar to cases of *stridhanam* property inherited from males only. What then are the grounds upon which these decisions proceed? All that the Privy Council say amounts to this. As Colebrooke's translation covers not the whole but only a portion of the Mitakshara, the other untranslated portions of the Mitakshara may in all probability be presumed to deal with the disabilities of women and to lay down that women take only a restricted estate in the property inherited from males, especially as Manu, Katyayana, Narada and others who lay down those restrictions and who are followed in the Mitakshara upon other subjects are most likely to be followed in this respect also. The argument that the verses in the Mitakshara under which women inherit to males are wholly silent as to the extent of the interest that women take is, therefore, not entitled to much weight; *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 M. I. A., at p. 173. Secondly, the argument founded upon the Mitakshara definition of *stridhanam* contained in section

XI, verse 2, has to be considered by reading verse 2 in the light of the other portions of the same section. Their Lordships observe "Another argument against including the wealth inherited from her husband in a woman's *stridhanam* as defined by the 2nd clause of the 11th section of the 2nd chapter of the Mitakshara, may be derived from clauses 11 to 25 (both inclusive) of the same section. These declare the husband to be, in default of the issue, the heir to "*the whole* property as before described." This is intelligible if the words "property which she may have acquired by inheritance" in the 2nd clause are considered to be property inherited in her husband's lifetime, or from some persons other than him," *Bhugwandeen Doobey* v. *Myna Bai*, 11 M. I. A., at pp. 512, 513. Later on they say: "Their Lordships, therefore, have come to the conclusion that according to the Law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate, whether moveable or immoveable to which a Hindu woman succeeds by inheritance, forms part of her *stridhan* or particular property; and that the text of Katyayana which is general in its terms and of which the authority is undoubted must be taken to determine—first, that her power of disposition over both is limited to certain purposes; and, secondly, that on her death both pass to the next heir of her husband." The text of Katyayana upon which their Lordships chiefly rely is in these terms:—"The childless widow preserving inviolate the bed of her lord and strictly obedient to her spiritual parents may frugally enjoy the estate or property until she die; after her, the legal heirs shall take it." And in support of the conclusion they arrive at upon a consideration of the various texts as a whole of the Mitakshara, their Lordships refer to the fact that in the other schools of Hindu Law, *stridhana* has been expressly declared not to embrace property inherited from the husband. It is thus clear that the Privy Council far from overruling or questioning the authority of the text, only interpret, *i.e.*, consistently with the other texts of the Mitakshara and in conformity with the general principles of Hindu Law which *Vijnanesvara* in common with Manu, Katyayana, Narada and others is held to have laid down. It is said that, according to that principle, a Hindu widow takes but a qualified estate in property inherited from the husband. In the result, the Privy Council construe clause 2,

section II, of the Mitakshara so as to exclude from the definition of *stridhanam,* the property inherited by a widow from the husband. These two decisions were followed in the later case in *Chotai Lall* v. *Chunnoo Lall,* 6 I. A., 15, which was a case of a daughter's inheritance to her father's property.

In this last mentioned case, the Privy Council observe that the original text of Yajnavalkya where the term "*Adi*" therein used is properly rendered into "or the like" does not afford any foundation for the argument in favor of the right of the widow and daughter to the entire interest in land acquired by inheritance. The Privy Council do not say that the text of the Mitakshara is of no authority; they merely say that that must be construed along with the other parts of the Mitakshara and that the reasons by which the argument in favor of the widow taking an absolute estate was answered by their Lordships in the previous cases were for the most part applicable to the case of a daughter. Accordingly they hold that under the Mitakshara, a daughter takes only a qualified or restricted estate in property inherited from her father, and that upon her death, the heirs of her father and not her own heirs are entitled to such property. Their Lordships observe: "They do not think this rule is opposed to the *spirit and principles* of the Law of the Mitakshara, on the contrary, it appears to them to be *in accordance with them.*" After this express declaration by their Lordships, it is idle to contend that they overrule or question the authority of the Mitakshara; on the other hand, they have only decided, as they themselves say, in accordance with the spirit and principles of the Law of the Mitakshara. In the latest case on the point which follows the above rulings, the Privy Council state it is impossible "whether with regard to the authority of other commentators or *to the other parts* of the Mitakshara itself, to construe this passage (Mitakshara, Chap. II, Section XI, *placitum* 2) as conferring upon a woman taking by inheritance *from a male* a *stridhanam* estate transmissible to her own heirs," *Muthu Vaduganadha Tevar* v. *Dora Singha Tevar,* 3 Mad. at page 301. The above rulings relate only to cases of inheritance *from a male* and have nothing whatever to do with cases of inheritance from a female. The Privy Council say nothing as to the extent or nature of the estate taken by a woman in property inherited from a female; and as already explained the reference to the other

commentators is only by way of fortifying the view they take of the Mitakshara itself.

Are there any such reasons for holding that the doctrine of *stridhanam* laid down in *verse* 2 of section XI of the Mitakshara cannot be consistently held to apply to cases of *stridhanam* inherited from females? Are there any texts which specifically lay down that women take only a qualified estate in such properties? Again are there any parts of the Mitakshara which are positively inconsistent with *verse* 2 just as there are for instance *verses* 11 to 25 of the same section with respect to property inherited from the husband? It is submitted that no such texts are discoverable and that none such has been pointed out by the advocates of the doctrine of limited interest. Again, is the view of women taking an absolute estate in property inherited from females, inconsistent with the principles and spirit of the Mitakshara? Far from being inconsistent, that view is eminently in harmony with its doctrine. As has been pointed out by Messrs. West and Bhuler in their Digest and by Dr. Jolly in his Tagore Law Lectures on Hindu Law, Vijnanesvara was able to effect a beneficial change in the old Smritic law and to place women almost on a footing of equality with men as regards this capacity to hold and deal with property. It was by his all comprehensive doctrine as to *stridhanam*, by his doctrine that property exists not merely for religious observances (which women are unfit to perform) but for secular purposes also and by other such bold teachings, that he was able to effect this reform in favor of women's rights. But as already stated the tendency of the decisions in Madras is in favour of placing on a footing of equality as regards the incidents of succession and alienation, *stridhanam* inherited from a female and *stridhanam* inherited from a male. The decision in *Sengamalathammal* v. *Velayuda Mudali* is cited as the leading case on this subject in this Presidency, and it is followed in later cases. It, therefore, becomes necessary to subject this decision to a somewhat critical examination. The case was one where the property in dispute was inherited by a woman from her mother. The Court observed —"Though according to the Mitakshara property acquired by inheritance is classed as *stridhanam*——this is contrary to all the authorities in the other schools of the Hindu Law and is not supported by the Smrithi Chandrika." Again "It is quite certain that all properties that a woman derives by inheritance

cannot be so classed if it be meant thereby that the peculiar course of succession applicable to women's special property is to be applied to it, for in Southern India as elsewhere, the property which a widow inherits from her husband cannot so descend, nor according to the case in this Court already mentioned property inherited by a mother from her son."

The argument that property inherited by a woman from a male descends in the line of the heirs of the last male owner is not entitled to as much weight as at first sight it may appear to possess. This view of *stridhanam* inherited from a male being transmissible to the heirs of the last male owner, has rather been the result of consistently following the other fundamental doctrines of the Hindu Law laid down or taken to be laid down in the Mitakshara itself, and it merely brings into harmony with section XI of the Mitakshara the other section of that work. Speaking of section XI, chap. II of the Mitakshara, Mayne observes: "No part of this section of the Mitakshara applies in terms to property which a woman has inherited from a male. But the reason for that obviously is, that the devolution of such property had been exhaustively treated in the former sections of the same chapter. In those sections, he, the author, explained how a man's property would go to his widow, his daughter, his daughter's son, and in default of them to parents and others." "Vijnanesvara includes under the term *stridhanam*, property which a woman has acquired in any way whatever. The descent of that which she has derived from a male, that is, from a husband, father or son is treated of in the earlier section of Chap. II. That which she obtained otherwise is treated of in section XI."

But are there any such considerations of inherent inconsistency in applying the rules of descent laid down in section XI of the Mitakshara to cases of succession to *stridhanam* inherited from a female? None such has been pointed out in the ruling under notice. Lastly, there now remains to be considered whether the Smrithi Chandrika does not support the view that property acquired by a woman by inheritance from a female does not class as *stridhanam*. The passage in the Smrithi Chandrika relied on is in placitum 8, Section 3, Chap. XI, and runs thus:—"Whatever the mother takes she takes for herself *like* the *stridhana* called *adhyagni* and the like,

and not for the benefit of both herself and her husband." Their Lordships do not explain how the passage in question can be regarded as an authority for their position. It may be argued that the expression *like* shows that property acquired by a mother by inheritance does not in itself constitute *stridhanam;* it is only *like stridhanam* and cannot, therefore, descend as such.

The argument based upon inference from the use of the term *like* cannot, however, bear much scrutiny. Throughout the *Smrithi Chandrika* there is not a single explicit statement that property acquired by inheritance does not constitute *stridhanam.* On the other hand, whatever indication there is in the *Smrithi Chandrika,* is rather in favour of the position that the expression *stridhanam* is wide enough to include property acquired by inheritance. After quoting Manu's description of the sixfold property of a woman, the author of the *Smrithi Chandrika* states that Manu's enumeration is not to be taken as a restriction of a greater number but only as a denial of a less, and in support of this view he invokes the authority of Yajnavalkya and Vishnu. See *placitum* 3 and 4, section 1, chap. IX. Again in *placitum* 11 the author of the *Smrithi Chandrika* gives instances of properties which are not to be classed as *stridhanam.* It is significant that property acquired by inheritance does not find a place in *placitum* 11. But the opinion expressed in paras. 3 and 4 in favour of a woman acquiring property in more ways than six is in favour of the view that property acquired by inheritance might be classed as *stridhanam.*

Now *placitum* 8, S. 3, Ch. XI is perhaps more open to the construction that fortifies the opposite view. It may be said that the point of resemblance, referred to therein, relates to the power of dominion which a mother has over property acquired by inheritance from her son. And this interpretation is supported by the preceding expression, "*takes for herself*" which means *takes absolutely* in the same way as she takes an absolute estate in *stridhanam* called *adhyagni.* The context also favours this interpretation. The sentence in question is intended to controvert Samboo's opinion, that in the case of property left by a deceased son the parents take a joint estate for the benefit of both.

If the above view that the mother takes an absolute estate is accepted, then there can be little doubt that it will descend in the

same way as *stridhanam* proper. The passage in question will then be a distinct authority against the view taken by the Madras High Court. In the passage in question the discussion is as to which of two parents is entitled to succeed before the other to the property left by a son. *Samboo* states that this discussion is uncalled for, inasmuch as whatever may be the order of succession, they take not an absolute estate, but only an estate for the benefit of both. The author of the *Smrithi Chandrika* states that this discussion is not uncalled for, but is necessary and states for this reason, that *Samboo's* position as to a joint estate being taken by his parents is not tenable, inasmuch as the mothor takes the property for herself like the *stridhanam* called *adhyagni*. Evidently the point of comparison is about the mother's estate in the inherited property being absolute as in the case of *adhyagni* which is a typical specimen of *stridhanam* proper. To infer that the expression *like* shows that the inherited property is not *stridhanam* is farfetched.

There is no question there at all as to inherited property being classed as *stridhanam* or not. Passing on to the other portion of the argument that the point of resemblance spoken of might be with reference to the course of succession applicable to inherited *stridhanam* property, we may say that the inference if any is against the view of their Lordships. The point discussed relates to inheritance and it may not be unnatural to suppose that the point of resemblance referred to is also about the order of succession. In opposition to *Samboo's* view the author of the *Smrithi Chandrika* maintains that the mother takes an absolute estate in such property and that after the mother the mother's daughter will succeed and not the mother's husband as in the case of *adhyagni* and other *stridhanam* properties proper. Again it is to be noticed that the rule of law contained in this passage of the *Smrithi Chandrika* as to a mother taking an absolute estate in property from her son, has not been considered as sufficiently authoritative and has not been followed by the Madras High Court.

In *Buchiraju* v. *Venkatappadu*, 2 M. H. C. R., 402, it was ruled that a mother inheriting from her son has not an absolute property in the estate she inherits, but only a limited interest. If this passage then has not been taken to be sufficiently authoratative and the rule

of law therein laid down has not been accepted as sound, how can a mere inferential argument based upon the use of a certain term be entitled to any weight.

Further, as already pointed out the inference appears to be unwarranted and too much strained in the light of the other portion of the Smriti Chandrika. The inference is also not supported by any passage in section I, Chapter IX of the *Smrithi Chandrika* which expressly treats of the different descriptions of *stridhanam*. On the other hand, there is nothing in section III, Ch. IX, which deals with succession to woman's property to show that the peculiar course of succession applicable to *stridhanam* property is not applicable to property inherited from a female. Paras. 1—15 deal with succession to three specified kinds of *stridhanam* properties. Para. 16 and subsequent paras. deal with maternal estates other than the three kinds noticed in the previous paras. The scope of the 16 subsequent paras. is sufficiently comprehensive so as to include even cases of properties inherited from the mother or other female relations. Lastly, the so-called inference can at the highest extend only to *stridhanam* inherited from a male; for the passage in question relates to property inherited by a mother from her son and not to property inheited from a female. The only safe conclusion then appears to be that the passage relied on does not show that property acquired by a woman by inheritance from a female does not descend as *stridhanam* proper. We have thus seen that the grounds of the decision in *Sengamalathammal* v. *Velayudha Mudali* appear to be questionable. Of the later decisions which follow this ruling the case of *Venkataramakrishna Rau* v. *Bujunga Rau*, I. L. R., 19 M. 107, does not point out any additional grounds.

The case of *Veeranangappa* v. *Rudrappa*, I.L.R., 19 M., 110, formulates certain additional grounds in support of the position that property inherited from a female does not descend as *stridhanam* proper. The learned Judges (*Best* and *Subrahmania Aiyar*, J. J.) deal with the argument that there is no reason for holding that the Mitakshara rule of succession laid down in section XI is not applicable with respect to property inherited from a female. The argument appears to have been misunderstood by the learned Judges. It does not assume as has been erroneously supposed by them that Vijnanesvara does not include in his description of

stridhanam, property inherited by a female from a male. Nor is such an assumption necessary to the validity of the argument. The argument is that the Mitakshara lays down a peculiar course of succession as being applicable to *stridhanam* or woman's property including property acquired by a woman by inheritance (whether from a male or a female); that though this rule of succession has been held inapplicable to *stridhanam* inherited from a male, still it does not necessarily follow that the same is inapplicable even to *stridhanam* inherited from a female. But the learned Judges take for granted the very point in dispute. They assume that because as to a portion of the inherited property of a woman the Mitakshara has not been followed, it, therefore, necessarily follows that it must be overruled likewise with respect to all the other inherited property of a woman. Starting with this assumption, their Lordships very properly conclude that the only way to support the argument is by contending that the case of property inherited from a female does not fall within the scope of the text of the Mitakshara which, according to their assumption, has been *fully and completely* overruled. But, as we have just now stated, the argument has been misunderstood by their Lordships. And we have already shown that the grounds upon which section XI of the Mitakshara has been held inapplicable to *stridhanam* inherited from a male are not applicable to cases of *stridhanam* inherited from a female. There is one more observation of their Lordships which remains to be noticed. They say that so far as this Presidency is concerned the Courts in rejecting Vijnanesvara's doctrine that the word, '&c.', in the Yajnavalkya *Smrithi* relating to what constitutes stridhanam, includes property inherited, have not proceeded solely on the authorities peculiar to the Dayabhaga school, but have been influenced considerably by the fact that the *Smrithi Chandrika* and the *Dayavibhaga or Madhaviyam* have put an entirely different construction on the same word in the said text." But this position does not advance the argument very far. It only shows as pointed out by the Privy Council in 6 I. A., page 15, that Yajnavalkya's definition of *stridhanam* does not, whereas Vijnanesvara's definition does, include property acquired by inheritance. Whatever may be Yajnavalkya's definition, does not Vijnanesvara there expressly state that property inherited is *stridhanam?* The Mitakshara, though it purports to be a commentary upon the institutes of Yajnavalkya, is in

itself an independent authority. It has introduced very many additions supplementing the institutes of Yajnavalkya and these additions are held binding in Southern India. The Privy Council do not say that Vijnanesvara is no authority because he differs from Yajnavalkya; on the other hand, they treat the Mitakshara text (*verse* 2, Chap. II, S. XI) as an authority only to be construed along with the other texts of that work and their Lordships refer to the other secondary authorities more by way of fortifying the conclusion they arrive at upon a consideration of the whole of the Mitakshara and of the leading doctrines therein laid down.

There are also other considerations which seem to point to the soundness of the view herein submitted. *Placitum* 30, S. XI, Ch. II of the Mitakshara lays down a special rule of succession to the inherited property of a maiden daughter; of which inherited property, it is held, she by that special rule appears to be made a full owner. Now with reference to property inherited by a maiden daughter from a male this position of the Mitakshara cannot now be considered to be any longer tenable. But with respect to property inherited from a female, it has been held that in accordance with the Mitakshara the maiden daughter takes an *absolute* estate, see *Narasayya* v. *Venkayya* 2 M. L. J. Rep., 149. And this decision has been considered in the case of *Venkataramakrishna Rau* v. *Bujanga Rau*, as laying down the law correctly and as being in consonance with the whole course of decisions in this Presidency, commencing with the ruling in *Sengamalathammal* v. *Velayuda Mudali*. The Court observed "The property was *stridhanam* in the hands of her mother, but it is *settled law* that such property when inherited by a daughter ceases to be *stridhanam* in her daughter's hands." "The succession to a maiden daughter is *the sole exception* to this rule; and in all the other cases quoted the question has been as to succession to a "*married* daughter." In other words the same property when taken by a maiden daughter will pass to her with absolute ownership, but when taken by a married daughter will pass to her with only a limited interest without power of alienation, except perhaps for necessity. It is thus seen from the above that the overruling of the law laid down in *placitum* 30 of the Mitakshara with respect to a portion of the inherited property of a maiden daughter, *i.e.*, to property inherited from a male, has been considered as not

rendering infructuous that rule of law with respect to the rest of the inherited property of a maiden daughter, that is to say, property inherited from a female. Does not then the same argument apply in favour of the operation of the Mitakshara rule of law laid down in placita 8-25, with respect to the inherited property of a married woman so far as such property may have been inherited from a female. With equal logic it may be said that the fact that the Mitakshara law of succession has been overruled with respect to a married woman's property inherited from a male, does not necessitate the conclusion that the Mitakshara rule of law must be taken to be inoperative with respect to married woman's property inherited from a female. It is hardly necessary to point out that the daughters whether married or unmarried inherit under *placita* 8-25. It is only with respect to succession to their estate different texts apply. *Placita* 8-25 apply to one case while *placitum* 30 applies to the succession to a maiden daughter. Now *placitum* 30 does not expressly state that the maiden daughter takes an absolute estate, but from the provisions that her heirs succeed to her property it is inferred that she takes an absolute estate. The inference is that because her estate passes to her own heirs she possesses an absolute estate. The same argument might be extended to *placita* 8-25. They say nothing expressly as to the nature of the estate taken by a married woman inheriting to a female; and from the provision that her own heirs succeed we can with as good logic infer that she takes an absolute estate. In short *placita* 8-25 do not any more than *placitum* 30 lay down one rule of succession as to limited interest and another rule of succession as to absolute interest left by a deceased woman. We shall presently show that the inapplicability of *placitum* 30 cannot furnish any argument against holding that an absolute estate was taken by the woman.

Again as it has been shown above, the net result of the whole course of decisions in this presidency is this: The same property when taken by a maiden daughter will pass to her with absolute ownership, but when taken by a married daughter will pass to her with only a limited estate. Let us test this position, by working it out to its full logical consequences. Let us first compare the case of a daughter who dies a maiden with that of a maiden daughter who subsequently marries. If the maiden daughter takes an absolute estate, it must relate to the time when the inheritance

opens. For it is at that point of time that the maiden daughter's acquisition of property by inheritance takes place. Suppose the maiden daughter subsequently marries and dies issueless, then clearly *placitum* 30 which applies to the property left by a maiden cannot govern the case; it is only the general rule laid down in *placita* 8-25, that must govern the devolution of the property of which the deceased continued to be full owner from the time the deceased herself inherited down to the time of her death.

In both these cases, it is undoubted that the heirs of the daughters themselves succeed, for in both the cases the propositus was full owner. Now, in these two cases, the succession by the daughters was under the same texts; though the succession to them is no longer under the same text. In one case it is under *placitum* 30, in the other, under *placita* 8-25; the non-applicability of *placitum* 30 in the latter case does not in any way show that the propositus did not take a full estate. It is thus clear that no argument against taking an absolute estate can be founded upon the inapplicability of *placitum* 30 to regulate the succession to the propositus. Let us next compare this intermediate case of a daughter who was a maiden at the time she inherited, but who subsequently married with the case of a daughter who all along was married.

It is said that the heirs of the daughter who was unmarried at the time she inherited but was married at the time of her death will succeed in preference to the heirs of the mother of such a daughter. But if the daughter was not a maiden but was married at the time she inherited, it is said, that she cannot transmit it to her own heirs, but that her mother's heirs will succeed. What difference could there exist in principle between these two cases. *Placitum* 30 of the Mitakshara is no longer applicable either to the one or the other of these cases. They are both governed by the general rule laid down in *placita* 8-25 of the Mitakshara. Beyond the accidental difference of one daughter being married at the time and the other remaining unmarried, there is no difference whatever between the two cases.

In the case of the maiden daughter subsequently married and of the daughter married already the inheritance by them was under *placita* 8-25 or strictly speaking under *placitum*, 13 they both

succeeded under the same texts. Again in both the cases the succession to them is under the same texts, for *placitum* 30 is no longer applicable. These texts are silent in the same way as *placitum* 30 as regards the interest taken by the propositus and all these texts are no longer authorities with respect to property inherited from a male. To be consistent, in both the cases, the propositus must be held to have taken an absolute interest, for both the cases have identically the same features. If in the case of a maiden daughter subsequently married, she is held to have taken an absolute estate, we must also hold that in the case the daughter married already, she takes an absolute estate. If inapplicability of *placitum* 30 does not stand in the way of holding that the maiden daughter subsequently married took an absolute estate, that cannot also be a reason against holding that the married daughter also took an absolute estate.

The scheme of the Mitakshara also appears to support the view herein put forward. In Chap. II the Law of Inheritance is laid down. The previous portion of the chapter deals with succession to a man's property. In the latter portion of the same chapter Vijnasasvara lays down the law of succession with respect to the devolution of woman's property; here too there is formulated a complete table of succession. These two tables of succession appear to be independent of each other. They seem to be completely exhaustive of the entire subject of succession. There is no necessity to supplement these by introducing any third line of succession. Their relative applicability has alone to be determined; that can be done by resorting to the fundamental doctrines of the Hindu law. The application of such doctrines has led to the position that in properties left by males, females take only a restricted heritage, but that in properties left by females, males take an absolute heritage. But there is no reason derivable from any paramount doctrines of the Hindu law, to support the position that females take only a restricted heritage in properties left by females, or the view that a third order of succession in modification of the order set out in the latter part of Chapter II of the Mitakshara may be applied to cases of *stridhanam* inherited from females.

If it can be conclusively established that a married woman takes only a restricted estate in property inherited from a female,

it follows as a logical consequence, that the property must after her death revert to the heirs of the last full owner, as the inheriting woman's interest ceases with her life and she leaves no outstanding interest of her own to be inherited by her heirs. In that view, the doctrine of reverter follows as a logical consequence and the non-mention of such a doctrine in the Mitakshara is no reason for not applying it. But if on the other hand, it is not clear that the inheriting woman takes only a limited interest, then the absence of any reference to such a doctrine in the Mitakshara will be an argument in favor of the view that in cases of doubt, that view should be adopted which would not involve the application of such a doctrine. In other words, the view that women take an absolute estate must be allowed to prevail. As observed by Mr. *Justice Telang* the doctrine of property reverting to the heirs of the last full owner is one which is nowhere expressed in the Mitakshara; and "it is not necessary or allowable to introduce that conception into the theory of *stridhanam*, without some basis for its being found in the original authorities," see *Manilal Revadat* v. *Bai Rewa*, I. L. R., 17 B., p. 758, at p. 768.

Looked at from this point of view the fact that the Mitakshara does not offer any basis for the doctrine of reverter is an argument in favor of holding the view herein put forward.

We shall now proceed to notice a few decisions that bear upon the points under discussion. The ruling in *Buchi Raju* v. *Venkatappadu*, 2 M. H. C. R., 402, is in favour of the view herein advocated. The High Court observed that some inherited property as that inherited from a mother will be rightly classed as *stridhanam*. The decision in *Narasayya* v. *Venkayya*, 2 M. L. J. Rep., 149, enunciates the same doctrine. Though this case was a case of succession to a maiden daughter, yet it laid down the wider proposition that "when a daughter succeeds to her mother's *stridhanam* she is as much full owner as her mother and it is her heirs and not her mother's heirs that are entitled to take." Such has been conceived to be the effect of this ruling by Mr. *Justice Subrahmania Aiyar* in *Veerasangappachetty* v. *Rudrappachetty* (I. L. R., 19 M., 110 at pp. 117-118), though the rulling has been understood to apply to the case of maiden daughter alone by Mr. *Justice Parker* in *Venkatarama Krishna Rau* v. *Bujunga Rau*, I. L. R., 19 M., p. 108. There

appears to exist no other reported decisions on the point. The rulings to the contrary have already been noticed and examined.

Again in the recent case of *Salamma* v. *Latchmana Reddi*, 8 M. L. J. Rep., 14, to the decision in which Mr. *Justice Subramania Aiyar* was a party, the court observed that the Mitakshara has on account of its innovation in favor of women and other causes become the chief authority on Hindu law and that a "departure from the law laid down by such a high authority *must not be* made unless supported by adequate grounds." The Court accepted the authority of the Mitakshara in opposition to that of the Smriti Chandrika and gave effect to the all comprehensive doctrine of Vijnanesvara with respect to *stridhanam*. In this case also their Lordships, however, treat the point now under discussion as having been already established by Judicial decisions against the authority of Vijnanesvara. Again in another recent case, *Muttappa Udayan* v. *Ammani Ammal*, 8 M. L. J. Rep., p. 9, the Madras High Court gave effect to the Vijnanesvara's doctrine of *stridhanam* with all its attendant incidents of succession in opposition to the authority of the *Smriti Chandrika*. If the paramount authority of the Mitakshara is recognised in these cases of *stridhanam*, why should it not be given effect to with respect to properties inherited from a female? Any other view, it is respectfully submitted, would only try to perpetuate the archaic smritic law against women, under which women were unfit to hold and deal with and to inherit property. Vijnanesvara under the usual pretext of rightly interpreting the old texts introduced advanced views and adapted the old law to the changing circumstances of modern society. It is submitted that that wholesome development of the Hindu law by Vijnanesvara should instead of being checked by our courts on the authority of obsolete smritic views, be on the other hand, maintained and be given effect to according to the later doctrines laid down in the Mitakshara. At a time when even the Mitakshara itself is felt to be behind the requirements of modern society and modern conditions (Mayne's Hindu Law, Section 38), to refuse to follow the spirit of the Mitakshara in these matters will lead to an undesirable state of stagnation and will end in doing what Vijnanesvara wished to avoid doing—namely, perpetuating the old law whose spirit had died away.

It is encouraging to find that the view herein submitted has the authority of Mr. Mayne's Hindu Law, 5th edition, para. 627. The order of succession in the case of property inherited by a female from a female has not till very lately received any discussion. Vijnanesvara uses the term (*stridhanam*) in its general sense and declares that all the property included in that term (except sulka) goes in the line of female heirs. I have already offered reason for supposing that he was not referring to property which she had inherited from males, but there is no reason why he should not have included property inherited by her from a female. ?

M. K. VAIDYANATHA IYER.

TRANSLATION FROM THE VIVADARATNAKARA.

CHAPTER XXXV.

On Partition after Re-union.

On this subject, Manu says :—" If brothers once divided live again together and make a second partition, the division shall in that case be equal and the eldest shall not there take an additional share."(1) *Commentary*—' Living together ' means ' living together as co-parceners.' The division shall be equal and no deductions shall be allowed in favour of the eldest, etc.

Again the same author says: "If among them, the youngest or the eldest is deprived of his share, or if either of them dies, his share is not lost."(2) *Commentary*—If [among re-united brothers one loses his share by becoming a *sanyasin*, etc., or dies, his share is not then lost.

Then as to the question who takes it, the same author says: " His brothers by the same mother having assembled together shall divide it equally as well as those brothers who were re-united and uterine sisters."(3) *Commentary*—' Of the same mother ' qualifies ' brothers.' Therefore, it is clear that it is only such of the brothers as are re-united with him and are born of the same mother that take the share. '*Sanābhayah*' means ' born of the same womb.

(1) Manu, Chap. IX, 210. (2) Manu, Chap. IX, 211.
(3) Manu, Chap., IX, 212.

Prakāsakāra says that of these the un-married only are here meant; because the married belong to the *gotra* of the husband.

Brihaspati says: "Those two who after division live again together affectionately, inherit to each other."(1)

Again he says: "When brothers who after division live again together out of affection, there is no question of priority among them at a second partition. When any of them dies or becomes a *sanyasin* from any cause, his share is not lost and it goes to his uterine brother; and his sister is entitled to a share out of it. This rule applies in the case of the deceased who left no issue, wife or father. If one among the re-united brothers acquire wealth by learning, valour or the like, two shares must be given to him and the rest shall have one share each."(2) *Commentary*—Wealth acquired by learning, valour and other kinds of wealth to the use of which he is exclusively entitled.

Nārada says: "The share which belongs to a re-united coparcener is declared to be his own. So when one of the sharers has no issue, it shall go to the rest after those who are childless."(3) *Commentary.*—'*Athonyahdá*' means 'in the absence of the re-united coparceners.' '*Nirbījeshu*' means 'who have no children.' '*Itarān,*' *i.e.,* 'those who have no share being not re-united.' '*Eyar*' means 'shall go.' Prakāsakāra says that they alone are heirs even though they have sons—and that the brother's share goes to the childless. Pārijāta, however, reads '*Anamshabhājah*' for '*Amshabhājah*'; but this reading has been abandoned, because it does not agree with many books.

Sankha says: "If one among the brothers leaves the country or dies, the rest shall divide his wealth except the *stridhana*. They shall also maintain his women for their lives, if they keep their husband's bed inviolate; but they shall refuse maintenance to other women. To his daughter, her father's share should be given for maintenance."(4) *Commentary.*—The women here meant are those who do not strictly perform the duties of widowhood but are not unchaste. The 'wife' in the text 'of the man dying without wife or father' refers to the wife who strictly performs the

(1) Brihaspati, Chap. XXV, 76. (2) Brihaspati, Chap. XXV, 73—75 and 77.
(3) Narada, Chap. XIII, 24. (4) Found in Narada XIII, 25—27.

duties of widowhood and is not unchaste. Pārijāta, however, says that 'women' here means women of the same class. Therefore, according to his view the word 'wife' in the text refers to the first wife of equal caste. 'To others' means 'to those who do not keep their husband's bed inviolate.' Kalpataru says that the daughter is entitled to as much wealth as is necessary for her maintenance till marriage and for the expenses of the marriage.

Yājnavalkya says: "The re-united brother inherits the wealth of the re-united deceased and shall give a share to the re-united born. The uterine brother shall take the share of the deceased uterine brother and shall give a share to the uterine brother born."(1) *Commentary.*—Of the deceased re-united heir, the re-united coparcener shall take the wealth and not the heir of the deceased. The uterine brother inherits to the uterine brother. The meaning is where brothers of different mothers unite, the uterine brother takes the wealth of the deceased re-united coparcener.

If now a re-united coparcener dies leaving his uterine brother not re-united with him, and his brother by a different mother re-united with him, the same author says: "A brother by a different mother if re-united, not any other half-brother, shall inherit the wealth. But a uterine brother though not re-united shall take it and not a brother by a different mother."(2) *Commentary.*—A brother by a different mother shall not take the wealth, if not re-united. By this text, both by the methods of agreement and difference, it is established that one being born of a different mother and living in re-union gives him a right to take the wealth. The word 'samsrishti' should not be read into the next clause. Therefore, one living in re-union also takes the wealth and if it is asked who it is, it is said that he is one born of the same blood and semen, *i.e.*, a uterine brother. By this portion of the text the right of a uterine brother though not re-united is established. Thus both these, having the right to take the wealth, are declared heirs. The same is the meaning of the reading '*Nānyodharadanam haret*' found in Kalpataru. '*Anyodharadanam*' means 'the wealth of a brother by a different mother.' The meaning is that a half-brother not re-united shall not take the wealth of his half-brother re-united. But others think the meaning according to the above reading is clear.

(1) Yajnavalkya, Chap. II, 138. (2) Yajnavalkya, Chap. II, 139.

Kātyāyana says: 'Of brothers, the re-united inherit to the re-united and the dis-united to those dis-united, in default of the wife, etc., of the deceased; for they inherit to each other if they have no issue."(1) *Commentary.*—When re-united brothers die, re-united brothers inherit; when dis-united brothers die, dis-united brothers inherit. 'Above' means 'in default of the wife, etc.' '*Nirbījanyonyabhāginah*' is a Dvandva compound.

Brihaspati says: "He is said to be re-united who having made a partition lives again out of affection with joint property in the same house with his father, his brother or his paternal uncle."(2) *Commentary*—The particle '*va*' indicates the existence of other alternatives. Thus even where after partition with his paternal uncle's son, he lives again with him in this manner, he is recognized all the world over as a re-united coparcener. Prakāsakāra, however, says that on the strength of this text re-union is not permitted among others than those here mentioned.

Here ends the chapter on "Partition after re-union."

CHAPTER XXXVI.

On the determination of the fact of partition.

On this subject, Nārada says: "Should the fact of a legal partition among coparceners be doubted, the determination of the point rests on the evidence of kinsmen, the partition deed and the doing of business severally by them. Among undivided brothers the performance of religious duties is single; but where a partition had been made they have to perform these duties, every one for himself. Gifts, receipts, cattle, food, houses, lands, and servants should be regarded as separate among divided brothers, as also cooking, religious duties, receipts and disbursements. Giving evidence, becoming a surety, giving or taking (money) may be performed by divided brothers but not by undivided brothers. Those brothers who perform their duties with their individual wealth should be regarded as divided even in the absence of a document."(3) *Commentary.*—'*Vibhāgadharmah*' means 'the fact of partition.' When it is doubted, *i.e.*, when it is not known whether it has been made or not, it should be determined by the kinsmen of the coparceners.

(1) Not found. (2) Brihaspati, Chap. XXV. 72.

'Deed of partition' means 'the document evidencing partition.' 'Doing of business severally by them' means 'from the fact of their keeping separate accounts of receipts and disbursements, etc.' 'Religious duties' means 'Vaisvadeva and other rites to be performed.' '*Āgama*' means 'income.' '*Vyaya*' means 'disbursement.

Yājnavalkya says: "When the fact of partition is denied, the truth of it must be ascertained by the evidence of kinsmen, near or distant, by written record, and by separate transactions in respect of houses and lands."(1) *Commentary*—'*Yautaka*' means 'divided' according to the meaning of the root '*yu*,' *i.e.*, to mix.

Again the same author says: "Among brothers, among husband and wife, and also among father and son, standing surety, borrowing and giving evidence are declared inadvisible where they are undivided."(2) *Commentary*—The word '*Parasparam*' (mutually) should be read into the text. Although Ápastamba points out that there is no possibility of a partition between husband and wife, still seeing that according to the text 'if the shares are made equal, then the wives also must be allowed to have equal shares,' Yajnavalkya could have contemplated a partition between the husband and the wife, and spoken of the husband and the wife in view to such cases; thus, there is no inconsistency.

Brihaspati says: "Those who keep their receipts and disbursements and wealth separately and lend money or trade mutually are mutually divided."(3) *Commentary*—'*Parasparam*' means 'without acting together;' or in effect, independently of each other. The word '*pritak*' at the beginning of the first verse should be read along with the second verse also.

Here ends the chapter on the determination of the fact of partition.

CHAPTER XXXVII.

Rights of co-parceners after partition.

On this subject, Nārada says: "If many persons descended from the same ancestor are separate in the performance of religious

(1) Yajnavalkya, Chap. II, 149. (2) Yajnavalkya, Chap. II, 52.
(3) Brihaspati, Chap. XXV, 92.

duties, their business transactions and their working utensils do not act together"(1) Commentary—This contemplates the case of many descended from the same person. '*Pritakdharmāh*' means 'performing their sacrifices, etc., separately.' '*Pritakkriyáh*' means 'having separate dealings, such as lending money, etc.' '*Pritakkarmagunopetah*' means 'separately engaged in protecting children, agriculture, service, etc.' '*Karmeshusaiyatah*' means 'acting together.'

The same author says what result flows from this state of things: "They may give away, or even sell, or do anything they please with their shares. They are masters of their own wealth."(2) *Commentary.*—The word *all* occurring in the text should be restricted in its signification agreeably to other texts. The various texts from Brihaspati and others quoted in the chapter on "withholding of gifts" should be remembered in this connexion as they narrow the scope of this text.

Brihaspati says: "Whatever share a man has been enjoying shall not be changed from him. Should one, having made a partition, contest it subsequently, he shall be fixed by the king to his own share and shall be chastised if he persisted in the contention."(3) *Commentary.*—Whatever share has been enjoyed by one who entered into a partition of his own free will shall alone be his share. All the rest of the verse only emphasises the principle.

Here ends the chapter on the rights after partition.

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(1) Narada, Chap. XIII, 42. (2) Narada, Chap. XIII, 43.
(3) Brihaspati, Chap. XXV, 94 and 95.

EQUITABLE SET-OFF.

Section 110 of the Code of Civil Procedure lays down the conditions under which a legal set-off can be claimed by the defendant in a suit. "Set-off at law is founded on Statute and to prevent cross-actions. It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which were already enforceable in an action; and it has always been accordingly held that a set-off can only be successfully pleaded when an action could have been maintained for the same debt." *Rawley* v. *Rawley*, 1 Q. B. D., 469. If the defendant's counter-claim or set-off falls under the aforesaid section, he can claim as of right to have it investigated in the same suit. Though not expressly provided for in the Code, it has frequently been held that the Courts in this country can entertain counter-claims where it would be inequitable to compel the defendant to have recourse to a separate suit. As the Lord Chancellor said in *Exparte Blagden*, 1 Ves. 465, "there is a difference upon set-off in equity and at law. In equity, it prevailed long before the statute. It must be a strict set-off at law or a case of mutual debt or credit." In *Clark* v. *Ruthnavaloo*, 2 M., H. C. R., 296, the Madras High Court, in referring to the corresponding sections of Act VIII of 1859, said: "These are provisions of a Code regulating procedure only, and whilst we think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say that, according to our present opinion, the Procedure Code was not intended to take away any right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in cases of mutual debts and credits, but *also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit.*" See also *Gauri Sahai* v. *Ram Sahai*, 7 N. W. P., H. C. R., 157; *vide* also 20 W. R., 410. Similar decisions have been given in regard to the Procedure Codes of 1877 and 1882. (*Kishorchand* v. *Madhowji*; I. L. R. 4 B. 407. *Bhagbat* v. *Bamdeb*, I. L. R. 11 C. 557; and also *Brojendra Nath Das* v. *The Budge-Budge Jute Mill and Company*, *Ib.* 20 C. 527). In this country, both the legal and equitable jurisdictions are vested in one and the same Court; and "natural equity says that cross-demands should compensate each other, by deducting the less sum from the greater, and that the difference is the only sum which can be justly due." There is no doubt whatever that the Court would have jurisdiction to entertain such counter-claims as we are here discussing.

This right of set-off is based on the Roman Law of *Compensatio*; and as Sir Thomas Clarke, M. R., observed in *Whittaker* v. *Rush*, Ambler, 407, "Equity took it up but with limitation and restrictions and required that there should be a connection between the demands." The Roman Law was restricted within narrower limits. Referring to the Code, Lib. IV, Tit. 31, it will be found that the Judges are cautioned not to be too ready to admit claims by way of set-off, and not only the inconvenience but the injustice is pointed out of subjecting a party having a clear debt to a lengthened investigation in the suit upon a knotty and doubtful claim. The doctrine of *compensatio* is discussed at length by Moyle in his Roman Law, Vol. I, pp. 559, &c. In *Ramagopal* v. *Majeti Mallikarjanudu*, 1 M. H. C. R., 396, the Court held that questions as to set-off will be dealt with upon the principles of English Courts of Equity, or of the Roman Law of compensation and that no weight will be given to objections derived from the peculiar language of the statutes of set-off.

We shall proceed to consider the conditions that must be fulfilled before an equitable set-off can be successfully set up. In England cross-demands are allowed to be set up as a defence to any suit; and it is not necessary that the claim set up should be analogous to that of the plaintiff; a claim founded on tort may be opposed to one founded on contract, or *vice versa*: *Stooke* v. *Taylor*, 1880, 5 Q. B. D., 576. But in India, the claim of the defendant against the plaintiff must be connected with the same transaction and must arise out of one and the same contract as that in respect of which the plaintiff's suit is brought (*Roulet* v. *Fetterle*, I. L. R., 18 B. 719.) In other words the right of equitable set-off exists in cases where cross-demands arise out of the same transaction, or are so connected in the nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant should be driven to a cross-suit. As Story says in his *Equity Jurisprudence*, "It is true that equity generally follows the law, as to set-off, but it is with limitations and restrictions. If there is no connection between the demands, then the rule is as at law. But if there is a connection between the demands, equity acts upon it and allows a set-off under particular circumstances." In *Krishnasawmi Pillai* v. *Municipal Commissioners for the Town of Madras*, 4 M. H. C. R., 120, which was a suit brought for recovering money due under a contract made between the plaintiff and the defendants, it was held that the defendants were entitled to set-off the amount of damages which the defendants had proved they had sustained by reason of the plaintiff's breach of the contract sued on. In this case, securities were deposited

expressly to secure the due performance of the agreement and the proceeds would undoubtedly be applicable to the payment of damages sustained by the Commissioners by the plaintiff's breach of contract; and further, the Commissioners were expressly authorised with respect to any breaches of contract to treat the monthly hire as a fund in hand for the same purpose. The claim of the Commissioners to set-off the damages was allowed, the court observing: "though the defendant's claim be for *unliquidated* damages, that is, for an amount which can only be ascertained by the decision of a Court, yet that circumstance does not necessarily exclude the right of set-off at equity, though it does at law." *Kishorchand* v. *Madhowji*, I. L. R., 4 B. 407, was also a case in which a claim for unliquidated damages, was allowed to be set-off. See also *Pragi Lal* v. *Maxwell*, *Ib.* 7 A. 284, and *Niaz Gul Khan* v. *Durga*, *Ib.* 15 A. 9. In *Bhagbat* v. *Bamdeb*, *Ib.* 11 C. 557, only that portion of the counter-claim which arose out of the same transaction was allowed to be set-off. In *Chisholm* v. *Gopal Chander*, *Ib.* 16 C. 711, which was a suit for arrears of salary, the defendant sought to set-off a sum of money on account of goods and property damaged, lost, or not accounted for by the plaintiff. Both the lower courts decided in favour of the plaintiff; but the High Court remanded the case to the Court of first instance for re-trial, observing as follows:—"They were in the nature of cross-claims, and were so connected with the plaintiff's claim for salary as servant and agent of the defendant, that it would seem inequitable to compel the defendant to have recourse to a separate suit to recover them . . . . The claims as made by the defendant arise for the most part out of the relation set up by the plaintiff in this suit, as a suit of master and servant, or principal and agent; and so far as these items are claimed in respect of the alleged neglect or misconduct of the plaintiff in his capacity of servant of the defendant, we think that the defendant was entitled to have the claims enquired into. Of course, there may be, as regards each item, several reasons why the defendant may fail in recovering; still, those are matters which will have to be enquired into."

The amount of the defendant's counter-claim must be capable of being *immediately* ascertained. (*Kishorchand* v. *Madhowji*, I. L. R., 4 B. 407. See also 22 W. R., 1). In *Rawson* v. *Samuel*, Cr. and Phil., 161, an action had been brought by the defendant against the plaintiff for damages for refusing to accept bills, and it being made to appear that there was a complicated account between the parties, the Vice-Chancellor had refused to restrain the trial of the action, but had restrained the execution, if a verdict should be found for the plaintiff, in order that the account might be taken in equity. But the Lord Chancellor, on appeal,

held that the existence of a long and complicated account was not a ground for staying the execution and said: "It will be found that this equitable set-off exists in cases where the party seeking the benefit of it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient. In the present case there are not even cross-demands, as it cannot be assumed that the balance of the account will be fouud to be in favor of the defendant-at-law. Is there, then, any equity in preventing a party who has recovered damages at law from receiving them, because he may be found to be indebted upon the balance of an unsettled account to the party against whom the damages have been recovered ?. " This was the ground of the decision in *Dobson and Barlow* v. *The Bengal Spinning and Weaving Company*, I.L.R., 21 B. 126, where the set-off claimed was not allowed.

On the other hand, if the set-off claimed is remote and unconnected with the subject-matter of the dispute and the claim is made merely with a view to defeat or delay plaintiff's just rights, then the set-off claimed cannot be allowed : See I.L.R. 18 B. 721. Unless it can be shown that the defendant's claim of set-off rests upon some equity which impeaches the plaintiff's legal rights to recover his demand, there is no ground for allowing the set-off (*Beasley* v. *Darcy*, 2 Sch. and Lef. 403 n.) In *Young* v. *The Bank of Bengal*, 1 M. I. A., 87, it was held that mere deposit of Government paper or other security does not of itself constitute a giving of credit and that a debt contracted before and unconnected with the deposit could not be set-off against the claim of the depositor's assignees to recover the balances of the securities after paying the debts in respect of which they had been deposited. In *Clark* v. *Ruthnavaloo*, 2 M. H. C. R., 296, which was a suit brought against the acceptor to recover the amount due upon several bills of exchange, the defendant sought to set-off a claim for unliquidated damages unconnected with the bills of exchange. *Scotland*, C. J., and *Bittleston*, J., after a review of the English decisions, held that the defendant had no right to set-off his claim against the debt due to the plaintiffs.

Further, the amount claimed to be set-off should not exceed the pecuniary limits of the jurisdiction of the Court. As Lord Esher, M.R., observed in *Stunmore* v. *Campbell*, (1892) 1 Q. B. 317, a counter-claim has the same effect as a cross action and is treated as an independent action except for the purposes of execution. It, therefore, follows that when the amount sought to be set-off exceeds the court's pecuniary jurisdiction, then the defendant's claim cannot be allowed. In *Brojendra*

Nath Das v. *The Budge Budge Jute Mill Co. Ld.* I. L. R. 20 C. 517, decided by *Petheram*, C. J., *Norris* and *O'Kinealy*, J. J., a suit was brought in the Calcutta Small Cause Court to recover Rs. 1,197-5-6, being the price of goods sold and delivered; and the defendant claimed to set-off a sum of Rs. 2,738-4-0, being the loss sustained by the plaintiff's breach of contract and prayed for judgment for the sum of Rs. 1,540-14-6 after giving plaintiff credit for the sum claimed by him. It was held that the defendant's claim could be set off if it were one which the Small Cause Court had jurisdiction to try; but the claim being to obtain credit for or receive the entire sum of Rs. 2,738-4-0, the Small Cause Court was without jurisdiction and no set-off could, therefore, be allowed. The question whether a decree could be passed in favor of the defendant for any balance which might be found due to him was raised but not decided. On the other hand, if the same court has both Small Cause and Ordinary jurisdiction and the amount sought to be set-off does not exceed the pecuniary limits of its ordinary, though it exceeds the pecuniary limits of its Small Cause, jurisdiction, the set-off may be allowed. In *Rampratap* v. *Ganesh Rangnath*, I. L. R., 12 B. 31, which was a suit brought to recover Rs. 36-7-9 from the defendant under the Small Cause Jurisdiction of a Subordinate Judge, the defendant claimed to set off Rs. 72 which exceeded the pecuniary jurisdiction of the Judge as Small Cause Judge. On reference to the High Court, *Sargent*, C. J., and *Nanabhai Haridas*, J., held that the set-off might be pleaded by the defendant and that the Judge would exercise his Small Cause Court jurisdiction in trying the claim of the plaintiff and his ordinary jurisdiction in trying the set-off.

Of course, the set-off can be allowed only in cases in which both parties fill the same character as they fill in the plaintiff's suit. In *Exparte Blagden*, 1 Ves. 465, it was held that a debt from a bankrupt to a married woman *dum sola* could not be set-off against a debt from her husband to the bankrupt, and also that the claim of the bankrupt's assignees upon a policy made before the bankruptcy, but on account of a loss after the bankruptcy, could not be set-off against a debt from the bankrupt. Again, in *Freeman* v. *Lomas*, 20 L. J., ch. 564, which was a suit brought by assignees of a bankrupt for payment of a legacy, the defendant who was the executor and residuary legatee, claimed to set-off moneys which he had paid as surety for the legatee; and his claim was disallowed, *Turner*, V. C., observing as follows: "I believe upon examining the authorities it will be found that, except upon special circumstances, Courts of Equity have never allowed cross-demands existing in different rights to be set the one

against the other." As instances of cases where set-off is allowed under special circumstances, we may refer to the English cases of *Exparte Stephens*, 11 Ves. 24. *Cavendish* v. *Graves*, 27 L. J. ch. 314, and *Jenner* v. *Merris*, 30 L. J., ch. 361. In the first case, bankers who were under a direction to lay out money in certain annuities, in the name and to the use of S, did not do so, but representing that they had done so, made entries and accounted for the dividends accordingly; and S, relying on their representations, gave a joint and several promissory note with her brother to the bank, to secure the brother's private debt to them; and the bankers failed, and their assignees in bankruptcy sued the brother alone; and on a claim by S, and her brother praying that they might be at liberty to set-off what was due on the note against the debt due from the bankers to S, the Court allowed the set-off. In *Cavendish* v. *Graves*, certain bankers had assigned the securities given by a customer indebted to them without giving him any notice of the assignment. The bankers having become bankrupt and the assignees of the securities having brought actions in the names of the bankers against the customer, the latter filed his bill against the assignees of the securities; and in that suit, it was held that the plaintiff was entitled to set-off the moneys due to him on his running account against the debts secured, the assignees being in no better position than the bankers had been. In the last case, it was held that a debtor who had advanced moneys for necessaries supplied to the deserted wife of the creditor was entitled in equity to set-off such moneys against the creditor's legal demand. The ground of the decision was that the debtor making the advance stood in the same position in equity as the trades people who furnished the necessaries, and was entitled to the same remedies.

The mere existence of cross-demands has never been deemed a sufficient ground for the allowance of a set-off in equity : *Harvey* v. *Wood*, 5 Madd. 459. But, as the Lord Chancellor said in *James* v. *Kinnier*, 5 Ves. 110, "Courts of Equity give relief in all cases where, though there are mutual and independent debts, yet there is a mutual credit founded at the time on the existence of some debts due by the crediting party to the others. By 'mutual credit' in the sense in which the terms are here used we are to understand a knowledge on both sides of an existing debt due to one party and a credit by the other party founded on and trusting to such debt as a means of discharging it." See also *Watson* v. *The Miclwales Railway Co.*, 36, L. J. C. P., 285. In *Jeff* v. *Wood*, 2 Peere, Will Rep. 129, the demands were on the one side, for a legacy by the assignees of the legatee who had become bankrupt, and on the

other, by the executor for money due to the testator's estate on account of the clothes, education and board supplied by the testator to the legatee when an infant. The Master of the Rolls decreed an account and declared that the executor was to pay only the surplus after deducting what was due from the legatee, as well to the executor as to the testator, observing as follows: "It is true; stoppage is not law; nor is it of itself a payment in equity; but then a very slender agreement for discontinuing or allowing the one debt out of the other will make it a payment, because this prevents circuity of action and multiplicity of suits which is not favored in law much less in equity. But it may be a doubt, whether an insolvent person may in equity recover against his debtor to whom he at the same time owes a greater sum, though I own it is against conscience that A should be demanding against B to whom he is indebted in a larger sum and would avoid paying it. However, it seems that the least evidence of an agreement for a stoppage will do; and in these cases, equity will take hold of a very slight thing to do both parties right, and it is still more reasonable that when the matter of the mutual demand is concerning the same thing, there the court should interpose and make the balance only payable."

The law on the subject of equitable set-off is thus summarised by *Fulton*, J., in *Dobson and Barlow* v. *The Bengal Spinning and Weaving Company* above cited;—"Though not expressly provided for in the Civil Procedure Code, it has frequently been held that the Courts can entertain counter-claims where it would be inequitable to compel the defendant to have recourse to a separate suit . . . . . So long, however, as the counter-claim or set-off does not fall under section 3, the defendant cannot claim as of right to have it investigated in the same suit. The question whether it is inequitable to compel him to resort to a separate suit, cannot be determined by any general rule, but depends on the facts of each case. In England, the discretionary power is recognized by orders XIX and XXII. In this country, though not conferred by Act, the discretion is exercised on general principles of equity. *Bhagbat* v. *Bamdeb*, I.L.R. 16 C. 711, may be referred to as a case where the Calcutta High Court refused to entertain part of a counter-claim which it considered too remote to be mixed up with the original claim. *Gray* v. *Webb*, 21 Ch. D. 802, is an instance where the Court in England, exercising its discretion under the orders, rejected a counter-claim. The discretion, it is true, is not an arbitrary power, but must be judicially exercised—*Huggins* v. *Tweed*, 10 Ch. D. 359." The principles which should guide a court in the exercise of its discretion have been above indicated.

Some points which have been decided in connection with this topic may also be incidentally noticed here. The law of limitation is not a bar to a set-off, unless the period therein prescribed has expired before the action is brought (*Walker* v. *Clements*, 15 Q. B., 1046.) Following this case, the Allahabad High Court has held that limitation will run from the time when the party claiming the set-off is actually damnified and will be reckoned to the date of the institution of the plaintiff's suit, and not to that of claiming the set-off. *Pragi Lal* v. *Maxwell*, I.L.R., 7 A. 287). In the same case, *Oldfield* and *Duthoit*, J. J., differed on another point, *i.e.*, whether the set-off claimed should be allowed in whole or in part, *Oldfield*, J., observing "if it is right to allow a set-off at all, it seems reasonable that it should be allowed to its full extent and not to admit it to the extent of merely defeating the present claim. It should be either allowed in full or not allowed at all;" and *Duthoit*, J., observed as follows: "It is clear that, not being *liquida causa*, the set-off could not be claimed under the provisions of S. 3 of the Code of Civil Procedure; and this being so, though I am prepared to allow that the set-off may be admitted as an equitable protection to the defendants against being cast in the plaintiff's suit, I do not see how, failing the provisions of S. 3 of the Civil Procedure Code, the defendants, who have paid no court fees on this account, can be allowed to recover a sum of money from the plaintiff." The same point was raised but not decided in 20 C. 527. The non-payment of court-fees is the only real difficulty; and if the requisite stamp duty is paid, there appears to be no reason whatever why the set-off should not be allowed to its full extent, so that in cases in which the set-off claimed exceeds the amount of the plaintiff's claim, the defendant will still be entitled to a decree for the balance as against the plaintiff. If this is not done, multiplicity of suits will be the only result and this evil should, of course, be guarded against. In *Hayatkha* v. *Abdulakha*, 6 B. H. C. R., A. C. J., 151, *Couch*, C. J., and *Warden*, J., held that a defendant may deny the plaintiff's claim and also plead a set-off and may obtain a decree for it, although no sum may be found to be due to the plaintiff. According to English Law, a counter-claim may be proceeded with, although the action of the plaintiff has been stayed or discontinued (order 21, *r.* 16); and where a counter-claim is established and a balance is shown in favor of the defendant, judgment may be given in his favour for such balance, or other relief may be given him (order 21, *r.* 17). Another point that has been decided is that the plaintiff in such a case is entitled to his costs (*Kishorchand* v. *Madhowji*, 4 B. 414). The English Law on this subject is thus summarised in the Encyclopædia of the Laws of England, vol. III, pp. 470—1: "Where a claim and counter-claim are both dismissed with costs, the plaintiff

(in the absence of any special direction) pays the general costs of the action, and the defendant pays only the additional costs occasioned by the counter-claim (*Saner* v. *Bilton*, 1879, 11 Ch. D. 416; *Mason* v. *Brentini*, 1880, 15 Ch. D. 287); and so, where both claim and counter-claim have been successful, the plaintiff will get the general costs of the action, though the result of the litigation as a whole may be in favor of the defendant; but the plaintiff, will not recover as costs of the action any costs which are fairly attributable to the counter-claim. (*In re Brown, Ward* v. *Morse*, 1883, 23 Ch. D, 377)."

P. DURAISWAMI AIYANGAR.

NOTES OF INDIAN CASES.

Durga Prasad Banerjee *v.* **Lalit Mohon Singh Roy,** I. L. R., 25 C., 86. It appears to us the decision in this case lays down a sounder rule than the decision of *Wier*, J., in *Narayana Devu* v. *Chath Venkataramayya*, 1. M. L. J., 332. S. 257-A provides that a sum paid in contravention of the provisions of the section shall be applied to the satisfaction of the judgment-debt. The question naturally arises, should it be so applied although the payment was brought to the notice of the Court many years afterwards or, does S. 258 say that the person paying the money should apply for satisfaction being entered *pro tanto* within the period limited by Art. 161 of the Limitation Act. A payment in persuance of an agreement of the nature mentioned in S. 257-A is mentioned in S. 258 as requiring to be certified. The nature referred to in the section merely appears to refer to the character of the agreement as giving time to the judgment-debtor, or as promising to pay something in excess and has no reference to the sanction which the Court is to give in order to render the agreement valid. It follows, therefore, that if an agreement under S. 257-A whether sanctioned or not by the Court falls within the scope of S. 258, when payment has been made in persuance of it, if such payment has not been certified, it cannot be recognized in execution.

Kali Kishore Deb Sarkar *v.* **Guru Prosad Sukul,** I. L. R., 25, C. 99. The decision in this case appears to us open to some doubt. There is, however, considerable authority in support of the view taken by the learned Judges; several decisions in Calcutta under the present and the earlier Codes and a case in Madras. The simple point is whether a question between a defaulting purchaser under S. 293 and the decree-holder seeking to recover the deficiency from him is one between the

parties to the suit or their representatives. We take it as a question relating to execution. For S. 293 expressly says that the procedure shall be according to the rules contained in the chapter for the execution of a decree for money. But that is not the whole point. Unless the question relating to execution is between the parties to the suit the order passed is not one under S. 244 and, therefore, not a decree. In *Amir Baksha Sahib* v. *Venkatachala Muduli*, I. L. R., 18 M., 439, *Shephard*, J., asks why if the Secretary of State executing an order for costs in a pauper suit be a party, should not the defaulting purchaser likewise be? But we deny the correctness of the premises and question the correctness of the decision holding the order relating to the Secretary of State's execution to be a decree. But assuming that a decree in favor of the Secretary of State for costs makes him a party, it does not necessarily follow that the defaulting purshaser is a party to the suit. The view of the Allahabad High Court in *Deoki Nandan Rat* v. *Tapesri Lal*, I. L. R., 14 A., 20, appears to us to lay down the correct rule.

We must confess, however, there is considerable force in the argument that the Full Bench decision in *Ram Dayal* v. *Ram Doss*, I. L. R., 1 A., 181, 188, passed upon the similar language of the old Code was left untouched by the Code of 1892.

Sarat Chandra Banerjee v. Bhupendra Nath Bosu, I. L. R., 25 C., 103. The decision in this case is an important one and appears to be perfectly sound. The executor of an Hindu will before the Hindu Will's Act came into force has not the estate vested in him so as to validate acts done by him with reference to the estate irrespective of the purpose or propriety of the acts. He has of course the powers of a manager under the Hindu Law. The idea of a will being foreign to the Hindu Law, and the conception of an executor entitled to deal with the estate at his will are equally foreign. His position, therefore, is one similar to that of a manager, the only analogy available in the Hindu Law.

Akikunnissa Bibee v. Roop Lal Das, I. L. R., 25 C., 133. The decision in this case raises a vexed question, as to whether an application for an order absolute under the Transfer of Property Act is one for execution of a decree. For purposes of limitation, it has been considered by the Allahabad High Court as one for execution. The learned Judges in this case follow the current of authority in the Calcutta High Court holding the application not to fall within S. 244, C. P. C. It is open to question whether the Allahabad view is correct. For an application to pass a decree is not an application to execute a decree. We are inclined to prefer the Calcutta view.

Kali Prosanno Ghose *v.* Rajani Kant Chatterjee, I. L. R., 25 C., 141. Now that the Legislature is said to be contemplating the revision of the Code of Civil Procedure, we would commend to its consideration the provisions regarding the finality of a decree upon an award. The careless language employed in S. 522 has led to an almost endless confusion of judicial decisions. Though we are disposed to think that the decision in this case lays down the right rule, it is difficult to deduce it from the language employed. The only question upon which the arbitrator's award should be final is its correctness upon the law or the facts. All other questions should be capable of being agitated in appeal. Whether the objection is one falling under S. 521 or is one which goes to the root of the award as that there was no submission or no award in law are matters which well form subjects for decision by a court of appeal. We think *Chief Justice Maclean* is putting it rather too high when he says that all the decisions quoted support his conclusion. Indeed the decision of *Subrahmania Iyer*, J., in the Full Bench Case, *Husanna* v. *Linganna*, I. L. R., 18 M., 423, is in favor of the view that the objections specified in Ss. 520 and 521 are not matters for appeal. We hope that definite and intelligible language will be employed in the re-drafting of the section.

Choa Lal Dass *v.* Anant Pershad Misser, I. L. R., 25 C., 233. We are glad that the power of the High Court to interfere at any stage of a criminal case in a subordinate court is clearly laid down. It is true that such interference ought to be exceptional and the principle laid down seems correct that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at its intermediate stage.

Mohendra Lall Mitter *v.* Anundo Coomar Mitter, I. L. R., 25 C. 236. The greatest possible confusion prevails as to what exactly the word *judgment* in cl. 15 of the Letters Patent means, so as to enable us to say when an appeal lies under that clause. In one case the Madras High Court went so far as to say that an order of adjournment in a suit was a judgment. This seems certainly not in accordance with the rule laid down in *DeSouza* v. *Coles* in 3 M. H. C. R. 384. The point received elaborate consideration in the *Justices of the Peace for Calcutta* v. *The Oriental Gas Company*, 8 B. L. R. 433. We have discussed the cases at length in a critical note in 2 M. L. J. 343. The decision in the case under notice that an appeal lies from an order refusing an application to commit for contempt of court does not seem to be quite free from doubt. The question as to what is a judgment has been raised in several English

cases under the Judicature Acts. But we presume they cannot settle the construction of the word in the charter.

The Secretary of State for India in Council v. Rajlucki Debi, I. L. R., 25 C., 239. Having regard to the punctuation, there seems to be no doubt that under S. 424 of the Civil Procedure Code, previous notice is necessary in an action against the Secretary of State. The words "in respect of an act purporting to be done by him in his official capacity" qualify merely "a public officer" and not "the Secretary of State for India." Even apart from the punctuation, it may be said that the action against the Secretary of State for India in Council must necessarily relate to his official capacity, unlike the case of a public officer who may be sued either for acts done by him in his public capacity or as a private individual.

A further question of importance is whether the action which requires previous notice is merely an action for damages for tort or for any relief in respect of an illegal act. It has been held in several cases where suits are brought against Municipal bodies or District Boards and previous notice is prescribed, such notice will be given only in cases where the action is for damages. There are many English cases also of the same description. There seems no warrant in the language of the Municipal Acts for restricting the notice to actions for damages. However that may be, we are unable to say that the learned Judges are wrong in declining to restrict the language of S. 424 to actions for damages.

Bhiku Khan v. Zahuran, I. L. R., 25 C., 291. We are disposed to prefer the decision of the learned Judges in this case to that of the Judges in the Allahabad case in *Queen-Empress* v. *Narain*, I. L. R., 9 A. 240. That decision has been dissented from by the Madras High Court in *Allapichai Ravuthar* v. *Mohidin Bibi*, *Ib.* 20 M. 3, and we think rightly. The defaulter is liable to as many months' imprisonment as the arrears will cover. The language of the Code in force when the case 6 M. H. C. R., Apx. 23, was decided was different. Having regard to the marked change in the language of the present Code, it is difficult to place the interpretation of the Allahabad Judges that the maximum period of imprisonment is only one month.

Enamul Huq v. Ekramul Huq, I. L. R., 25 C. 294. The point decided by *Sale*, J., in this case is one of some importance. Where an order for inspection has been made giving liberty to the plaintiff or his agent to inspect, the Court does not lose all control so as to be unable to

prevent the plaintiff employing any person he choses. Apart from authority, on principle it would seem to be right that the Court should have the discretion to prohibit the employment by the plaintiff of a person who was formerly in the service of the defendant in respect of the same business to assist in the inspection.

Prohlad Teor v. Kedar Nath Bose, I. L. R., 25 C., 302. It may seem a strange proposition to hold that a tenant by encroaching upon another land of his landlord becomes a tenant of that land likewise without the consent of the landlord; and yet Mr. Justice *Markby* appears to have given the weight of his authority to that proposition in *Gooroo Doss Roy* v. *Issur Chunder Bose*, 22 W. R., 246. If the encroachment is upon the land of third parties then that might be regarded as an addition to the holding and the tenant cannot claim the benefit of it for himself, but must pass it on to the landlord at the termination of the tenancy. But there is no warrant for the proposition that the tenant can defeat the landlord's claim to present possession by encroaching upon another land of his not included in the holding.

Bindubashini Dasi v. Harendra Lal Roy, I. L. R., 25 C. 305. The Privy Council held in *Dakhina Mohun Roy* v. *Saroda Mohan Roy*, I. L. R., 21 C., 142, following the decision of the House of Lords in the *Peruvian Guano Company* v. *Dreyfus Brothers & Co.*, 92 A. C., 166, that a payment of revenue by a successful claimant in possession was not a voluntary payment and was recoverable, though it was subsequently found that he was not entitled to possession. At the time of the payment he was in possession in good faith under a decree. In the case under notice, at the time of payment which we assume to have been *bona fide* made, there was no decision in his favor which would give him the interest which would justify the payment. But there was a claim made by him and that was being enquired into. The claim, no doubt, was ultimately found against. A slight extension of the principle of the Privy Council case would undoubtedly justify the decision. Although we are inclined to think that the claimant had no interest in the property at the date of payment, strictly speaking, it seems just to hold that in equity and good conscience he was entitled to recover.

Kali Pado Mukerjee v. Dino Nath Mukerjee, I. L. R., 25 C. 315. The decision in this case does not appear to us to be altogether free from difficulty. The Munsif's local jurisdiction was reduced, and a question as regards the jurisdiction to execute a decree in a suit which would not have been triable if the limitation as to jurisdiction had been in force at the date of the action by that Court, was raised.

The *Chief Justice* and *Banerjea*, J., are of opinion that the court which passed the decree not having ceased to exist is to have jurisdiction to execute it; and, therefore, the new Court having jurisdiction over the excluded area was not the Court to execute the decree. This is plausible enough. But suppose it was a decree for land unlike the case under notice where the jurisdiction depended upon the cause of action and the residence of the defendant and the jurisdiction of the court was cut down and the land fell within the jurisdiction of another court, can it be said that the court having ceased to have jurisdiction to try has jurisdiction to execute the decree? Supposing no new court was substituted for the excluded area, can it not be said that the court had ceased to exist for that area? Or suppose the pecuniary limit was cut down and the decree was for a larger amount, it seems it may be said with propriety that the court has ceased to exist or to have jurisdiction. The same reasoning would suggest that the execution in the case under notice was rightly had in the new court.

Radha Rani Dassi *v.* Brindabun Chundra Basack, I. L. R., 25 C., 320. A conditional order for a certificate of succession upon the appellants giving security was held not appealable under the Succession Certificate Act in *Bhagwani* v. *Manni Lal*, I. L. R., 13 A., 214. This case was followed by *Subrahmania Aiyar*, J., but dissented from upon a Letters Patent appeal by the *Chief Justice* and *Benson*, J., and in another case by another Division Bench, *Ariya Pillai* v. *Thangammal*, I. L. R., 20 M., 442. We think the Calcutta Judges have rightly refused to follow the Allahabad decision.

SUMMARY OF RECENT CASES.

Trade competition—Under-selling.

Ajello *v.* Worsley, [1898, I, Ch. 274, per *Stirling*, J.]

The plaintiff was the manufacturer of pianos of a particular type called the Brittania model type. The defendant, a retail dealer, advertised for sale of pianos of the plaintiff's manufacture at the same price at which the plaintiff was supplying the same to the trade, and he continued this advertisement even after he ceased to have in stock any pianos of the particular type and after the plaintiff had refused to supply him with the same. The result of this was that other dealers gave up their dealings with the plaintiff who immediately instituted an action asking for an injunction to restrain the defendant from issuing the advertisement. *Stirling*, J., before whom the case came on for disposal, *held*, that the

plaintiff had no cause of action, as, even supposing that the advertisement amounted to a misrepresentation that the defendant had pianos of the particular model in stock,—such misrepresentation was not the cause of damage to the plaintiff's trade.

The owner of any property is at liberty to sell or dispose of it for such consideration as he thinks fit and either at a profit or loss. The motives of the owner for so acting cannot be inquired into. Further, any person may sell or dispose of or offer for sale, any goods of which he is not possessed, but which he expects or hopes to acquire, and for any price he pleases and manufacturers have no right to complain that it in this respect affects their trade so long as they cannot trace the damage done to their trade to any fraud or misrepresentation practised on the public with respct to their goods.

Executor—Right of retrainer in specie.

In re **Gilbert**; *Exparte.* **Gilbert**, [1898, I, Q. B., 282,] per *Wright*, J.

G died insolvent, having by his will appointed his wife executrix of his will. His wife was one of his creditors and the debt due to her far exceeded his assets. The executrix proved the will and took possession of all the assets without converting them. Another creditor of her husband applied to her for particulars of the deceased's estate to which she replied by a letter in which she claimed to retain the whole estate for payment of her debt. Thereupon, the creditor presented a petition under the Bankruptcy Act, became the trustee in bankruptcy and took possession of the estate. In a suit by the executrix for recovery of possession, *held by Wright*, J., that as the debt due to the executrix far exceeded the value of the testator's assets, she was not bound to realise the assets, *i. e.*, convert them into money, before exercising her right of retainer, but was entitled to retain the assets in specie in satisfaction of her debt.

Income tax—Foreign principal.

Watson *v.* Sandie and Hull, [1898, I, Q. B., 326.]

The respondents were commission merchants carrying on business at Liverpool and they used to get consignments of goods for sale from a merchant in the United States. The respondents invoiced the goods to their purchasers in their own name guaranteed payment by their purchasers and remitted to their principals the proceeds of the sales less

their commission charges and expenses. On a claim by the crown against the foreign principals for payment of income tax :—

Held, that though as between the purchasers and the respondents there might be a presumption that the respondents were the vendors, there was no corresponding presumption as between the foreign principal and the respondents, that the property in the goods had passed from the principal to the agent and that, consequently, the sales by the respondents were as between them and the foreign principal made on behalf of the principal and that, consequently, the latter was liable to pay the tax claimed.

Practice—Misjoinder of causes of action.

Gower v. Couldridge and others, [1898, I, Q. B., 348, C. A.]

The plaintiff was a shareholder of a company of which the defendants were the directors. The plaint alleged a fradulent conspiracy by two of the defendants to promote a company to buy up a worthless business. As against the third defendant the plaint contained a statement of a statutory liability but he was not charged with being a party to the conspiracy. There was also a charge as against all the defendants of false and fradulent representation in the prospectus of the company. The suit was one for damages as against all the defendants :—

Held, (in the Court of Appeal) that the suit was bad for misjoinder of causes of action.

Sale of partnership assets—Goodwill.

Jennings v. Jennings, [1898, I. Ch. 378 per *Stirling, J.*]

The case of *Trego v. Hunt* (1896, A. C. 7) has established that where a person sells the goodwill of his business, he may set up a rival business, but he is not entitled to canvass the customers of the old firm, and may be restrained from soliciting any person who was a customer of the old firm prior to the sale to continue to deal with the vendor or not to deal with the purchaser. This rule is only an application of the general principle that a man may not derogate from his own grant, —may not pocket the price and then recapture the subject of sale,— and arises out of the relation of vendor and purchaser. In the present case, A., the member of a partnership firm of A. and B. brought an actionagainst B, for rescission of the partnership on the ground of

misrepresentation by B. The action was, however, compromised on the terms that the partnership was to be dissolved, that A. was to get 1,200 £ and that B. was to retain the assets. The goodwill of the business was not specifically mentioned in the compromise. B., subsequently, brought an action for an injunction restraining A. from canvassing the customers of the old firm. Upon motion for an interlocutory injunction :—

Held, that, upon the facts above stated, the relationship of vendor and purchaser existed between A. and B., that the word *assets* was a compendious expression for the aggregate of the several items of property belonging to the partnership and that an agreement for the sale of such assets would in most cases have the same effect as if the several items of property were specifically mentioned including the goodwill and that, following *Trego* v. *Hunt*, B. was entitled to the injunction sought for.

Covenant running with the land—Private Residence.

Hobson *v.* **Tulloch**, [1898, I. Ch., 424. per. *Romer*, J.]

The plaintiff was the owner of two premises—" Runnymede " and " Whitefriars," both forming part of a purely residential estate and he conveyed the latter to J. S. subject to a covenant on the part of J. S. " not to use and occupy or permit to be used or occupied the said messuage or dwelling-house for the purpose of any trade or manufacture, or for any other purpose than a private residence." The defendant purchased the house in question from J. S. for the purpose of utilising it as a boarding house for scholars attending a school kept by him in the neighbourhood. Plaintiff sued for an injunction restraining the defendant from breaking the covenant :—

Held, (by *Romer*, J.) that the user converted the house from a private residence to the business of a boarding house and that the plaintiff was entitled to the injunction sought for.

Vendor and purchaser—" Default," meaning of—Delay in completion.

In re **Woods and Lewis'** *Contract*, [1898, I. Ch. 433 per *Romer*, *J.*]

The plaintiff had agreed to sell certain leasehold premises to the defendant and the sale was to have been completed on the 31st August 1897. The contract to sell contained a clause to the effect that " if from any cause whatever other than the *default* of the vendor the purchase

shall not have been completed on the 31st August, the purchaser shall pay to the vendor interest . . . until the completion of the purchase." On the delivery to the purchaser of the abstract of title, it appeared that there was a defect in the title which was immediately brought to the notice of the vendor who at once took steps to rectify the defect. The defect was not known to the vendor at the date of the contract, nor was the defect so obvious as to make ignorance on his part inexcusable or unreasonable. The defect was cured and the purchase completed only in November, 1897. The plaintiff claimed interest for the intervening period and the defendant refused on the ground that the delay was caused by the *default* of the plaintiff within the meaning of the terms of their contract; *Romer*, J., held that the delay in question was not due to the default of the vendor.

"*Default*," as defined by *Brown*, L. J. *In re Young and Harston's contract* (31 Ch. D. 168) "is a purely relative term just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction."

Construction of will—Absolute gift.

In re **Jones. Richards** *v.* **Jones,** [1898, I Ch. 438 per *Byrne*, J.]

It is an established rule of construction that, where a gift is made in terms to a person absolutely, that can only be reduced to a more limited interest by clear words cutting down the first estate. The rule though simple in the statement is very difficult in its application, and it is very doubtful whether *Byrne*, J., has properly applied the rule in the case before him. A testator by his will gave all his property to his wife "for her absolute use and benefit, so that during her lifetime for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely. After her death, as to such parts of my.........estate, as she shall not have sold or disposed of as aforesaid, subject to my wife's funeral expenses I give ....the same" in trust for sale for the benefit of other persons. The wife was appointed sole executrix. The wife took possession of the whole estate and at her death she disposed of it by her will. In a contest between the legatees of the husband's will and her own:—

Held, (by *Byrne*, J.) that the widow took an absolute interest in the estate and that it passed under her will.

Election—Recount of votes—Onus of proof.

Lord Monkswell and others v. Thompson, [1898, I. Q. B. 479.]

There were five seats vacant in the School Board of London for the Chelsea division. There were eight candidates who applied to be elected for the same. At an election held to fill up the vacancies, five of the candidates were duly elected according to the number of votes they had secured, the polling officer publishing their names in due course as elected. After this publication, a petition was presented by the candidate who was the sixth in the poll against the election of the person who stood fifth on the poll on the allegation that certain votes given in favour of the plaintiff were erroneously rejected or counted for the defendant or some other candidate by the returning officer and that by reason of such mistakes the result of the poll had not been duly ascertained and that, if the votes had been properly counted, he would have had a majority of lawful and valid votes. A recount was accordingly made of the votes given for the plaintiff and the defendant alone, and it was found that the petitioner had a clear majority over the defendant. The votes of the other candidates were not recounted. The defendant contended that what the plaintiff had done was not enough and that he must go a step further, have the votes of all the candidates recounted, inasmuch as it was probable that his votes had been wrongfully added to the other four candidates who had been declared elected by the polling officer. The petition of the plaintiff had not made the other four candidates parties, neither had the defendant taken any steps to bring them before the court within the time allowed by law for the purpose:—

Held, that the petitioner was entitled to the fifth seat, and that it was enough for him to establish that he had more votes than the defendant, and that it was unnecessary, so far as he was concerned, to recount the votes given for the other candidates.

Practice—Service of writ—Service according to contract.

Montgomery, Jones and Co. v. Liebenthal and Co., [1898, I Q. B. 487 C. A.]

The plaintiffs were corn merchants carrying on business at Liverpool and the defendants were merchants residing and carrying on business in Scotland. The defendants had agreed to sell a cargo of wheat to the plaintiffs, and that contract contained a stipulation that all

disputes arising out of the contract should be referred to two arbitrators, that any party to it shall for the purpose of such proceedings be deemed to be resident at the office of London Corn Trade Association and that service of proceedings upon a party residing or carrying on business in Scotland or Ireland, by leaving the same at the office of the London Corn Trade Association, together with the posting of a copy of such proceedings to the address in Scotland or Ireland shall be deemed good service, *i.e.*, good personal service. Disputes arose between the parties as to the non-delivery of the wheat in accordance with the contract and were referred to arbitration, and an award was made in favour of the plaintiffs. The plaintiffs issued a writ in execution to be served against the defendants within the jurisdiction and served it by delivering a copy thereof to the Secretary of the London Corn Trade Association at the office of the association in London and they also sent a copy of the writ by post to the defendants at their address in Leith. The defendants applied to the judge at chambers to set aside the service as being illegal:—

Held, that the service was proper and that generally the parties can, as regards the mode of service, contract themselves out of the rules of practice, and may appoint a person as agent to accept service, so long as they do not ask the court to do something which it is prohibited from doing under the rules.

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The Allahabad Weekly Notes for May and June (*in exchange*).

The Green Bag for May and June (*in exchange*).

The Canadian Law Times for May (*in exchange*).

The Harvard Law Review for May and June (*in exchange*).

The Canada Law Journal for May (*in exchange*).

The Educational Review for May (*in exchange*).

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DE MINIMIS.—It is not often that an article by a law student receives judicial notice, and so the following, from *Farrington* v. *Putnam*,

90 Me. 405; 38 L. R. A. 339, will be read with curiosity on account of its condescension and the mild damnation of the student's views:—

"The complainants quote in their brief an article in the 'Harvard Law Review' (January, 1896), in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful questions, the view taken in the *McGraw* Case, and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones* v. *Habersham*, 107 U. S. 174, 27 L. ed. 401, in which *Mr. Justice Gray* wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the Court, he evidently not being aware that the same case was first deliberately considered and decided by the Circuit Court, where *Bradley*, J., of the Supreme Court delivered the opinion, *Gray*, J., stating that fact in the first line of his own opinion":—*The Green Bag.*

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Extraordinary wills:—Cremation clauses are becoming quite common in English and Continental wills; but many of them are ignored by the relatives. Many testators now make some provision in their wills to ensure their not being buried alive. For instance, the late John Blount Price, of Islington, directed that four days after his death two skillful surgeons should be paid $ 25 each to perform such operation on his body as would kill him in case he were yet alive. The Viscount de Carros Lima directed that his body should be watched by his heirs until decomposition set in. A similar provision was made by an Irish gentleman, who died last year. A Vienna millionaire seemed to have a horror of darkness, for he provided not only that the vault in which his body was to be, should be lighted by electricity, but that the coffin also should be similarly illumined. Lord Newborough made provision for two separate interments.

One finds it difficult not to think harshly of the man recently deceased in this State, who in his will left his property to "the woman who lives with me," meaning by that his true and lawful wife. Not long ago a Boston man died, whose will left his wife penniless unless she married again within five years, the reason given for this proviso

being that he wanted somebody else to find out how hard it was to live with her—truly a monstrous revelation of post-mortem spite, and one that any decent court ought to set aside :—*The Green Bag.*

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A learned lawyer:—A lawyer of bland manners, who was better known for his faculty for getting business than for his conception of the bearings of an authority from the books, was one day arguing a motion before a very patient judge. He had quoted from four or five decisions and had said nothing that had any application to the case in hand. Pointing to a long row of volumes in calf binding on the table he exclaimed: "Your Honor, if these cases I have read to you are not just in point, I would have you know that I've got all these other ones here that are equally satisfactory!" :—*The Green Bag.*

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A woman witness:—"Now," said the lawyer who was conducting the cross-examination, "will you please say how and where you first met this man?"

"I think," said the woman with the sharp nose, "that it was"—

"Never mind what you think," interrupted the lawyer. "We want facts here. We don't care what you think and haven't any time to waste in listening to what you think. Now please tell us where and when it was that you first met this man."

The witness made no reply.

"Come, come," urged the lawyer, "I demand an answer to my question."

Still no response from the witness.

"Your Honor," said the lawyer, turning to the court, "I think I am entitled to an answer to the question I have put."

"The witness will please answer the question," said the court.

"Can't," said the woman.

"Why not?"

"The court doesn't care to hear what I think, does it?"

"No."

"Then there's no use questioning me any further. I am not a lawyer. I can't talk without thinking."

So they called the next witness:—*The Green Bag.*

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A Judge cogitating audibly :—The story is told that a certain judge who, during the plea of a rather prosy lawyer, could not refrain from gently nodding his head in sleep, was caught at this by the lawyer, who looked significantly at him.

"Perhaps," said the judge, testily and prevaricatingly, "the counsel thinks the court was asleep, but he may be assured that the court was merely cogitating."

The lawyer talked on. Presently the judge, again overcome by his somnolency, noded off and aroused himself with a little sudden snorting snore.

"If it please your honor," said the lawyer, "I will suspend my plea until the court shall have ceased to cogitate audibly :—*The Green Bag.*

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Attaching a dead body for debt :—An interesting question has arisen in Pennsylvania in connection with the cremation of the remains of George W. Ferris, the inventor and constructor of the great Ferris wheel at the Chicago World's Fair. A statement in a Pittsburg paper, to the effect that the body of Mr. Ferris was being held in the crematory of Undertaker Sampson, in that city, for the unpaid funeral expenses contracted something over a year ago led the New York Sun to declare, with characteristic vigor, against what, it termed the pernicious practice of arresting or attaching the dead body of a human being upon any debt or demand whatever. It is a well-known principle of the common law that to seize a dead body on pretence of arrest for debt is *contra bones mores*, and an extortion on the relatives (4 East, 460). And in some States there are statutes declaring it to be a misdemeanor to attach or seize, under execution, a dead body (Cal. Penal. Code, § 295; Me. Rev. St., ch. 124, § 26; Mass. Pub. St. 207, § 46; R. I. Pub. St., § 3222). The law wisely places upon the next of kin the duty of providing decent burial of the body, the health and protection of society being the controlling consideration in such cases, As public policy demands the burial of decaying human remains, it would be manifestly improper, as well as dangerous, to allow the burial to await a settlement of the debt, no matter for what purpose it might have been incurred. The question arises, however: Is the holding of a dead body for debt a different thing from holding the incinerated remains of such body? In the case in point it appears that the undertaker properly performed his duty and reduced the mortal remains of Mr. Ferris to a few handfuls of ashes. His bill for such service not having been paid by the wife or other

relatives, the ashes continue to do duty as "collateral." In answer to the objection that to hold human remains as security for debt is none the less against public policy, although the inevitable reduction of the body to dust has been hastened by the purifying influence of fire, the Philadelphia Press remarks: "A principle or policy of law which is manifestly right when applied to a decaying and putrescent body is wholly inapplicable to innocuous and impershable ash. A crematory is a manufacturing establishment where corruption puts on incorruption and mortality is converted into a material which, if protected, will last indefinitely. It is hornbook law that a bailee for hire, who by his skill and labor imparts an additional value to the goods, has a lien upon the property for his reasonable charges. If the miller who converts a farmer's wheat into flour, or a tailor who makes a serviceable suit out of cloth brought to him, may retain the product until he is paid his charges, why may not the owner of a crematory have a lien for the value of his labor on the ashes which he has purged from everything that can pollute the atmosphere or in any way contaminate or harm the living?"

The Press, it cannot be denied, makes a very clever and ingenious argument in behalf of the alleged bailee in this case—the crematory company—but we have serious doubts whether the highest court in any of the States would be willing to give their assent to the proposition it lays down. It can hardly be claimed that the crematory company, in the case in point, is in any true sense a "bailee for hire." No one will, of course, deny that such a bailee, who receives chattles or materials to be repaired or manufactured, has a lien upon the property for his services; but it may well be doubted whether the reduction of a dead body to ashes imparts any additional value to the remains. The most serious objection, however, to the application of the principle of bailor and bailee to the case in point seems to us to be found in the necessity of classing human remains as commercial products. Such remains, in the nature of the case, can have no value other than a sentimental one, constituting, as they do, the last earthly remnants of the departed, and precious only as they recall to memory the intimate and tender relationships that once existed. To class such remains with wheat, corn, oats or other products of well known commercial value would be revolting in the extreme, doing violence to the most sacred of human relationships. It would be very easy for the crematory company to collect its charges in advance, before undertaking the process of reduction, but to give it a lien on the remains for its charges is something which we do not believe either the legislatures or the courts are yet prepared to assent to. This precise question has never been, so far as we are aware,

passed upon by the courts in this country. It ought to be :—*The Albany Law Journal.*

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English Criminal Evidence Bill:—The Criminal Evidence Bill has been introduced in the House of Lords by the Lord Chancellor, and its text has been published. The principal provision is that every person charged with an offence, and the wife or husband, as the case may be, of the person so charged shall be a competent witness at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. There are these provisos: (*a*) A person so charged shall not be called as a witness in pursuance of this Act without his consent. (*b*) The wife or husband of the person so charged shall not, save in this act mentioned, be called as a witness in pursuance of this act, without the consent of the person so charged. (*c*) Nothing in this act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during marriage. (*d*) A person charged and being a witness in pursuance of this act shall not have the right to refuse to answer any question on the ground that it would tend to criminate him as to the offence charged. (*e*) A person called as a witness in pursuance of this act shall not be asked, and if asked, shall not be required to answer, any question tending to show that any person charged has committed or been convicted of any offence other than that wherewith he is then charged, or is of bad character, unless (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or (ii) the person charged has asked question of the witnesses for the prosecution with the view to establish his good character or called witnesses to his good character, or otherwise has given evidence of good character; or (iii) the person charged and called as a witness has given evidence against any other person charged with the same offence.

2. (1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this act may be called as a witness without the consent of the person charged. (2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person :—*The Albany Law Journal.*

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Repartee On The Bench.—John Toler, Earl of Norbury, who was Chief Justice of the Court of Common Pleas in Ireland from 1800 till 1827, has the reputation of having, for many years, enlivened legal proceedings with brilliant drolleries. Here are some of Lord Norbury's *mots*, as collated by the Law Times:

Dr. Tory, the Roman Catholic archbishop of Dublin, was noted for his hospitalities. A Mr. Æneas MacDonnell was leaving the archbishop's house, where he had been dining, and as he went out, Lord Norbury, who was passing by with a friend observed him. "There goes the ancient warrior," he said. "What do you mean?" was the reply. "The pious Æneas returning from the sack of Troy."

Lord Norbury had a country neighbor whose cattle often roamed on his grounds, but when Lord Norbury's cows returned their visit he was immediately threatened with an action. "Forgive us our trespasses," he wrote somewhat irreverently, "as we forgive them that trespass against us."

On hearing, as he was walking down to court, that a crowd which he perceived on the quay near the Four Courts was gathered together from the circumstance of a tailor having been rescued from suicide by drowning. "What a fool," exclaimed the Chief Justice, "to leave his hot goose for a cold duck."

He was on one occasion riding with a friend named Spear, who was mounted on a fast-trotting horse. "You should," said the Chief Justice, "call that quadruped Shakespeare."

A gentleman having boasted in his presence of having shot seventy hares before breakfast, Lord Norbury caused a laugh by observing very drily, "I daresay *you fired at a wig.*"

An attorney having died in straitened circumstances, a collection was made for the payment of his funeral expenses. "How much will satisfy you?" said Norbury to one of the collectors. "A shilling will be sufficient," was the answer. "Well, here is a guinea; go and bury one-and-twenty of them."

Having sentenced a criminal to death in the usual form, he was surprised by the condemned man's exclamation; "A long day, my lord!" "You shall have it," was the reply; "this is the twentieth of June—to-morrow will be the longest day in the year."

On an action brought against a man named Paul, several letters of the defendant were put in evidence. The jury expressed a wish to see

them. "By all means," replied Lord Norbury. "Send up those 'Epistles of Paul.'"

Lord Norbury had a country house in Cabra, a suburb of Dublin, but few were ever entertained by him, though from the apparent heartiness of his invitations one would have believed him to be a most hospitable man. A story is told of an old gentleman and his wife having responded to the usual good-natured question, "When will you spend a few days with me?" by going to Lord Norbury's residence with bandboxes and portmanteaus. Lord Norbury, with great presence of mind, on seeing these preparations for their sojourn, came immediately to the hall door: "Now, my dear friends, this is so kind of you. I'll really take no excuse; you must positively oblige me by staying to dinner:"—*The Albany Law Journal.*

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Agency—Banks—Draft for Collection.—The plaintiff placed a draft for collection with a bank. The bank exercised reasonable care in the selection of sub-agents necessarily employed to do the work, and seasonably transmitted the draft through such sub-agents to the place of payment. *Held*, that on default of one of these sub-agents the bank was not liable to the plaintiff for the amount of the draft. *Irwin* v. *Reeves Pulley, Co.*, 43 N. E, Rep. 601 (Ind.); *State National Bank* v. *Thomas Mfg, Co.*, 42 S W., Rep. 1016 (Tex.).

There is much conflict of authority as to the liability of a bank to one who deposits with it a draft for collection in a distant place. In the federal courts, in New York, and in some other States, the bank is held to be an independent contractor, and so liable to the depositor for any default of its correspondents. *Exchange National Bank*, v. *Third National Bank*, 112 U S., 276; *Allen* v. *Merchants' Bank*, 22 Wend. 215. In other States the doctrine of the principal case prevails. *Dorchester Bank* v. *New England Bank*, 1 Cush. 177. The question is really one of fact. It would seem that from the nature of the case there is an implied authority for the appointment of sub-agents by the collecting bank. The latter is not expected to collect personally, and the better view seems to be that it ought not to be held to anything more than reasonable skill and ordinary diligence in the selection of its correspondents. Mechem on Agency, § 514:—*Harvard Law Review.*

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Contracts—Implied Promise to Pay for Services.—The plaintiff performed work for the defendant, at the latter's request. At the time

the plaintiff intended to make no charge, as he expected to receive employment from the defendant. The defendant did not know of the plaintiff's intention, but had made no agreement to pay. *Held,* the plaintiff could recover the value of his services. *Thomas* v. *Thomasville Shooting Club*, 28 S. E., Rep. 293 (N. C.).

If both parties understood that the services were to be gratuitous, of course the plaintiff could not recover. No legal obligation would be created by the performance of work which was intended and received as a gift. *Osborn* v. *Guy's Hospital*, 2 Str. 728; *Collyer* v. *Collyer*, 113 N. Y., 442. But in the absence of agreement or special relations between the parties, when one person does work for another, at the latter's request, there is an implied promise to pay for it. A secret intention to make no charge does not make a gratuity of that which would otherwise create a legal obligation. At most, such intention only shows that, under certain circumstances, the one who did not work was willing to waive a legal right which he might enforce if he desired. *Baxter* v. *Gray*, 4 Scott N. R., 374; Keener, Quasi-Contracts, 315 *et seq.* :—*Harvard Law Review.*

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Contracts—Specific Performance—Statute of Frauds—A and B entered into an oral contract as to certain land. B alone signed a memorandum sufficient to satisfy the Statute of Frauds. *Held,* that A was entitled to specific performance, for by bringing the suit, plaintiff, in writing, consents to the contract and makes the remedy as well as the obligation mutual. *Central Land, Co.* v. *Johnston*, 28 S. E., Rep. 175 (Va.).

The case is interesting as overruling *Wood* v. *Dickey*, 90 Va. 160, which seems to be the only decision *contra* in any court, although some of the earlier cases contain *dicta* to the same effect. The decisions are usually put on the ground that plaintiff, by bringing the action, makes the remedy mutual. A better reason would appear to be that the memorandum on plaintiff's part can be made at any time, and the bill itself may be regarded as one. This is suggested in Story, Eq. Jur. § 755, and adopted as the proper ground in Browne, St. Frauds, § 366, where the authorities are collected :—*Harvard Law Review.*

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Contracts—Stranger to the Consideration—Sole Beneficiary.—The declaration alleged that defendant offered the services of his stud-horse for a certain sum, and further agreed to pay $ 750 to the owner of the

first of the foals of said stallion that should trot a mile in two minutes and thirty seconds. One P bred his mare to this stallion, and sold the foal to plaintiff to whom, on performance of the condition, defendant refused to pay the $ 750. On demurrer, it was *held* that the declaration stated a cause of action. *Whitehead* v. *Burgess*, 38 Atl. Rep. 802 (N. J.).

The court construed the contract to mean that the money was to be paid to the person who should own the colt at the time it should trot the mile. Perhaps a more natural construction would be that the money was to be paid to the owner of the dam, in which case the contingent right of action would be impliedly assigned by the sale of the colt. On the construction adopted by the court, the plaintiff was clearly a sole beneficiary though a stranger to the consideration. Earlier cases in New Jersey establish the doctrine of *Lawrence* v. *Fox*, 20 N. Y. 268, that a third party may sue at law on a contract made for his benefit, provided the promise looks to the satisfaction of a valuable claim of the third person against the promisee. *Laing* v. *Lee*, 20 N. J. Law, 337; *Joslin* v. *New Jersey Car Spring, Co.*, 36 N. J. Law, 141. The New York courts, resting the doctrine on the principle of subrogation, refuse to extend it to actions brought by a sole beneficiary. *Buchanan* v. *Tilden*, 39 N. Y. Supp, 228. In the present case this distinction was not taken, the court treating, *Joslin* v. *New Jersey Car Spring, Co.*, *supra*, as necessarily controlling the question to be decided. There appears to be no other case in New Jersey according a right of action to a sole beneficiary :—*Harvard Law Review*.

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Property—Reigistry of Deeds—Notice.—A sold land to B, and later to C, who recorded his deed first. After B's deed was on record, C mortgaged the land for value to D, who was ignorant of B's claim. D then recorded. *Held*, that D's title would prevail over B's, if C bought without notice of the previous deed to B, otherwise not. *Parrish* v. *Mahany*, 73 N. W. Rep. 97 (S. D.).

The South Dakota statute makes every deed of land void against a later *bona fide* purchaser for value whose deed is first recorded. Taking this literally, C would be protected and could pass good title, if he bought in good faith; but if not, he would not be protected, nor would D, since the latter's deed was not first recorded. The decision might have been put on this narrow, perhaps too narrow, construction of the statute. The court, however, goes on the ground that D, having constructive notice of the earlier deed to B, must at his peril ascertain if C bought *bona fide*. This is begging the question, as it is much disputed

whether a grantee has notice of any deeds by a grantor under whom he claims, if recorded after the deed by that grantor which is in the grantee's chain of title. *Conn.* v. *Bradish*, 14 Mass. 296; *Morse* v. *Curtis*, 140 Mass. 112; *Fallass* v. *Pierce*, 30 Wis. 443; *Woods* v. *Garnett*, 72 Miss. 78. Another branch of the same general question was touched on in the discussion of *Bennett* v. *Davis*, 38 Atl. Rep. 372, in 11 HARVARD LAW REVIEW, 344 :—*Harvard Law Review.*

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Property—Tenant at Will—Notice to Quit.—The plaintiff was A's tenant at will. A conveyed the premises to B, and B received rent from the plaintiff. B afterward leased part of the premises to C, and the plaintiff was forcibly ejected by the defendant, C's servant, without notice to quit. *Held,* the plaintiff's tenancy was terminated by the lease, and he could not maintain trespass *quare clausum.* *Seavey* v. *Cloudman,* 38 Atl. Rep. 540 (Me.).

Upon payment of rent to B, the plaintiff became B's tenant at will. *Anderson* v. *Prindle,* 23 Wend. 616. So the question for the court was whether a landlord could terminate a tenancy at will by a lease of part of the premises, without giving the statutory notice to quit. The result reached, that the statute did not apply to the present case, and that the tenancy was terminated by the lease without notice, seems to be in harmony with previous decisions in Maine and Massachusetts. It has been held that a tenancy at will is terminated without notice to quit when the landlord conveys the premises: *McFarland* v. *Chase,* 7 Gray, 462; *Robinson* v. *Deering,* 56 Me. 357; even if the conveyance is merely colorable; *Curtis* v. *Galvin*; I Allen, 215; so, too, when the landlord leases the whole premises: *Pratt* v. *Farrar,* to Allen, 519. The principal case provides one more way of escaping the requirements of the statute. As a result, there seems to be but little vitality left in the statute, and the estate of a tenant at will is as precarious as it was at common law :—*Harvard Law Review.*

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Sales—Delivery—Second Vendee.—Apples were sold to the plaintiff but left in the possession of the vendor, who afterwards sold and delivered them to the defendant, an innocent purchaser. *Held,* the defendant was not guilty of conversion. *Cummings* v. *Gilman,* 38 Atl. Rep. 538 (Me.).

After the first sale the vendor is bailee and the vendee bailor of the chattel. Whatever may be the right of the bailor's assignee (10

HARVARD LAW REVIEW, 57), it is well settled that the bailor may maintain trover against the purchaser from the bailee. 2 Notes to Saunders, 91, note, h. The defence to such an action must rest on the ground that the vendee has been guilty of fraud in allowing the chattel to remain in the hands of the vendor and is, therefore, estopped from denying that the latter is his agent for sale. *Jewett* v. *Lincoln*, 14 Me. 116. The vendee should have a reasonable time to take possession. *Ingraham* v. *Wheeler*, 6 Conn. 277, 284; *Kleinschm dt* v. *McAndrews*, 117 U. S. 282. *Lanfear* v. *Sumner*, 17 Mass. 110, seems to be the only case where a recovery has been refused unless fraud was shown, but this case has been severely and apparently justly criticised. *Ricker* v. *Cross*, 5 N. H. 570; *Meade* v. *Smith*, 16 Conn. 346, 365; *Taylor* v. *Boardman*, 25 Vt. 581 :—*Harvard Law Review*.

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A Master of Irish Legal repartee.

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We have narrated in a former article some of the passages at arms between Curran and the bench during his earlier years at the bar. When he attained an indubitable position as a leader he did not hesitate to rebuke a Chief Justice and a Lord Chancellor. He was addressing a jury in one of the state trials in 1803 with his usual animation. Lord Norbury, the Chief Justice of the Common Pleas, who was presiding, had an evil reputation as "a hanging judge." Curran observed that the Chief Justice shook his head in doubt or denial of one of his arguments. He paused and looked straight at the Chief Justice. "I see, the gentleman," he said, "I see the motion of his lordship's head: common observers might imagine that it expressed a difference of opinion, but they would be mistaken—it is merely accidental—believe me, gentlemen, if you remain here many days you will yourselves perceive that when his lordship *shakes his head* there's *nothing in it*." Between John Fitz-Gibbon, Earl of Clare, the Irish Chancellor, and Curran there was a deep-seated hatred extending over the greater part of their careers. Fitz Gibbon had fought, when he was Attorney-General, a duel with Curran in a quarrel arising out of a scene between them in the Irish House of Commons. Curran said that Fitz Gibbon on that occasion took deliberate aim at his heart, and he has stated that Fitz Gibbon's hostility, which drove him out of practice in the Court of Chancery, entailed on him a loss of at least £ 30,000. One day, when it was known that Curran was to make an elaborate argument in Chancery, the Chancellor brought a large Newfoundland dog with him upon the bench, and, during the

progress of the argument, he lent his ear much more to the dog than to counsel, and at length began ostentatiously to fondle the animal. Curran stopped at once. "Go on, go on, Mr. Curran," said the Chancellor. "Oh, I beg a thousand pardons, my lord. I really took it for granted that your lordship was employed in consultation."

Curran and Egan fought a duel, owing to some temporary estrangement. The meeting was, however, bloodless. Egan complained bitterly that the disparity of their sizes gave Curran an advantage. "I might as well fire at a razor's edge as at him," said Egan, "and he may hit me as easily as a turf stack." "I wish, Mr. Egan," said Curran, "to take no advantage whatever of you. Let my size be chalked upon your side, and I am quite content that every shot which hits outside that mark should go for nothing:"—*The Albany Law Journal.*

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Justice Brewer on "the Nations Anchor."—We take the liberty of extracting the following address of Mr. Justice David J. Brewer, of the Supreme Court of the United States, at the Lincoln birthday celebration by the Marquette Club of Chicago, on the suggestive subject, "The Nation's Anchor"—meaning, of course, the great tribunal of which he is a member—from *The Albany Law Jurnal.* Justice Brewer spoke as follows:

"*Mr. Chairman and Gentleman of the Marquette Club:* This is the most cosmopolitan city on the face of the globe. Every citizen of Chicago admits the fact. Within its limits all ages of history are repeated, all nations and races are represented. Nothing of sight, sound or smell has been known in time or space but has here its counterpart. Who has not heard of Babel, with its dissonant voices and its confusion of tongues? But babel was only a kindergarten in languages compared with Chicago. The sense of smell is never disappointed. Germany may boast of her many-scented city of Cologne; but as the proud dweller by the stream which courses through your midst sniffs the evening breeze he challenges the world for a larger variety or a greater intensity of smell. And with a prodigality of enormous wealth and a charity tempered by wisdom, you do not propose to appropriate all this fragrance to yourselves or to waste it on the desert air, but to distribute it freely among the dwellers by the banks of the Illinois and in the upper Mississippi Valley.

"The wandering Jew finds here a home, and establishes himself in magnificence surpassing of Solomon in all his glory, having around him

all that monarch possessed, save 999 of his 1,000 wives, and, thanks to the capacity of the Chicago divorce courts, may have even a thousand wives, provided he will take them consecutively and not contemporaneously.

Two Pits and Corners.

"The ancient Joseph was thrown by his brothers into a pit, only to emerge therefrom as a successful speculator in Egyptian grain, but the Chicago Joseph throws everybody in your pit and puts up a corner in wheat so immense as to make even a mummied Pharaoh groan with envy.

"I heard the Chief Justice of the United States, himself a citizen of this 'no mean city,' exultingly declare that Chicago had within its limits more Poles than any city in Poland, more Bohemians than any city in Bohemia, more Germans than any city in Germany save Berlin, more Irish than any city in Ireland except Dublin, more Italians than any city in Italy save Naples and Rome. And then I ventured to add, as a suitable climax, doubtless more saints and sinners than any places in the universe save heaven and hell. The Chief Justice promptly admitted the charge as to the saints, but evidently thought that New York might be a successful rival in the matter of sinners. The air of sanctity which fills this room sufficiently attests from which class of your people this gathering has been summoned.

"In this cosmopolitan character and in the heterogeneous elements of its population, Chicago but typifies the nation, of which it is the great central city. This is the one land towards which all nations move, and within whose borders every race save the 'heathen Chinee' finds welcome and a home. John on Patmos doubtless had no apocalyptic vision of America, although he pictures it when he spoke of that 'great multitude, which no man could number, of all nations, and kindreds, and people, and tongues.' It is the genius and mission of our country to take these heterogeneous elements, these fragments of varied and ofttimes antagonistic races, and weld and fuse them into one homogeneous people, whose great achievements shall be equal rights and universal liberty.

Wisdom of the Fathers.

"Is this achievement within the reach of man? Yes, thank God, it is; made so by the grand conception of a written Consitutation and a permanent and independent judiciary. The fathers may not have foreseen the marvelous mingling of all races within our borders which the

century has accomplished, and yet if they had foreseen it they could not have devised a wiser system of government than that which placed in organic laws limitations upon the powers which a majority may exercise, and created a tribunal separate from the law-making body to determine at the instance of any citizen whether those limitations have been passed. Power to make a law, and at the same time to declare that that law does not transcend any constitutional limitations is equivalent to power to ignore those limitations whenever a temporary exigency may demand.

"It is true that in Great Britain liberty abides without any written constitution. There is no organic instrument which the people have lifted up above their representatives, beyond whose terms and limitations those representatives may not go. The will of the people, be it ever so changing, is, as expressed from day to day in the legislative enactments of Parliament, the supreme and incontestable law. If, as one of the English judges said to a friend, 'Parliament should enact that Lord Salisbury might without compensation take possession of Hawarden Castle, and oust therefrom its present proprietor, William E. Gladstone, the courts would be bound to enforce that as the law of the land.'

"But parliament never does such a foolish and unrighteous thing; and why? Because of the checks and counter-checks in her legislative system growing out of the essentially different characteristics of her two legislative bodies, because of the conservative natures of the single homogeneous race—the Anglo-Saxon—which fills the land and controls the government, and because of the limited suffrage which restricts the power to the more conservative of even that race. By reason of these three facts, despite the monarchical form of government, despite the absence of any constitutional restraints, liberty finds a stable abiding place in the English Isles.

"In this country the legislative bodies of the nation, though differently selected, represent the voters. We have universal suffrage and a population as heterogeneous as the different races of the world will permit. An unrestricted and absolute legislative freedom would certainly sweep on to despotism of the mob, whose despotism is always followed by the man on horseback.

People v. *Rabble.*

"Let no one misunderstand me or impute an intent to assert that our institutions are perfect. The order which reigns in Warsaw is not the great end of political existence. ...True, I do not stop to discuss what changes, social and political, ought to be made. I concede that

many are necessary, made so by the rapidly varying conditions of life, and very likely to become more imperative in the days to come. Those changes may be radical and far-reaching, and I am glad to note that the best and most earnest thought is being given to the consideration of what ought to be done. All I insist upon is that they shall be wrought out by the deliberate action of the whole people in the appointed way, and not foisted upon us by any crowd that may happen to gather at the street corner.

"We see too often the spectacle of some local and limited gathering of individuals, some association or organization, meeting and, like the three tailors of Tooley street, resolving, 'We, the people,' forgetful of the facts that seventy millions of people have freighted their all of earth in this, our goodly ship of state, and that they have the supreme right to say that no mere handful shall lower a single sail or take the rudder from the hands of the select pilots. Whatever is to be accomplished in the way of change shall not be by the South American habit of revolution, but by the North American process of evolution.

"If against some Local movement some effort of a few, the Supreme Court calmly lifts its staying hand and says, 'Thus reads the Constitution,' let no man haste to destroy that court or weaken its power in order that the restraints of the Constitution may be safely ignored, but let the people proceed in the appointed way to change or remove any restraints in that instrument which they believe stand in the way of a better social and political life.

"Government by Injunction."

"No one can be blind to the fact that there is to-day in the land a movement to displace the courts. It is part and parcel of the scheme to array the many against the few, the masses against the classes, and this is done under the pretence of realizing a more complete government by the people. The leaders are to adroit to propose their total abolition. The cry is to shear them of jurisdiction and leave them like painted ships on a painted ocean. The shibboleth of this movement is 'government by injunction,' and in support of the claim that there is danger of liberty from the action of courts, great names are invoked, even the name of him whom we honor to-night. They quote his declaration that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by a decision of the Supreme Court, the people will cease to be their own masters, ignoring that in the same great message he declared that the

dicisions of that court in any case must be binding upon all the parties thereto; that it was a duty from which judges could not shrink to decide all cases properly brought before them, and that it was no fault of theirs if such decisions were turned aside to political purposes.

"I am as much opposed to government by judges as any man. They are no more qualified to exercise the functions of government than the clergy, and a theocratic government was long since proved a failure. But the writ of injunction is not an act of legislation. It creates no new law. It only enforces rights which the Constitution and the law have, theretofore, declared sacred. It is as old as the struggle of the English-speaking people for liberty, and it has been used to protect and not to govern.

"The only distinguishing feature of it in the practice of to-day is one necessarily growing out of the great combination of men and capital. It is sometimes applied for against many instead of against a single individual. Do numbers change rights? If one man trepasses on my property, and I may have injunction to restrain him, is my right to protection any the less clear because a thousand join in the trespass? The commom sense of every one thunders an answer in the negative and affirms that there is nothing more despicable in any idea of justice than an effort to measure it by numbers of votes or wealth. The great strike of which this city was the historic centre attests the wisdom of judicial interference. As one of the leaders in it declared, 'It was not the soldiers that ended the strike, it was not the old brotherhoods that ended the strike, it was simply the United States courts that ended the strike.'

True Glory of the Strike.

"And to the great honor of the men who were engaged in it, be it said that while they yielded not to any show of force, they did yield to the decisions of the lawfully constituted tribunals of the nation. The peaceful ending of that strike is a supreme attestation of the power of the American people to govern themselves. That honest and true-minded men were on both sides of that controversy no sensible man doubts, and that it was settled judicially and not by bayonets and bullets is the glory of all. And here let me say in passing that the hero of that struggle for the domination of law was Circuit Judge William A. Woods, whose name will be revered and honored through the coming ages long after the memories of his critics and assailants shall have become like the body of Lazarus four days in the grave.

"It is not part of the functions of a judge to govern, and notwithstanding the talk about government by injunction, there has never been

any attempt by courts to exercise the function of government. That it was the understanding and purpose of the framers of the Federal Constitution that the judiciary should exercise the power of determining whether any given statute conflicts with the fundamental law was affirmed early in the history of the court in a vigorous opinion of the great chief justice, and has been affirmed and reaffirmed again and again since, and has been and is the general understanding. That such is the true interpretation of the Constitution is evident from the fact that there has never been any serious effort for a change. That the judiciary might never usurp the functions of government and attempt to legislate, it was given no power over the purse or sword of the nation. It can neither itself legislate nor compel congress to legislate. It can take no money out of the public treasury, neither can it direct the movement of the army of the nation. It has to depend on congress for the means of its existence, and appeal to the executive for the enforcing of its judgments.

Tribute to Supreme Court.

"And now how during the century of the national life has the Supreme Court discharged the solemn duties imposed upon it? That it has made mistakes is undoubted. No sensible man off or on the bench ascribes to it infallibility. I certainly should be the last to believe it infallible. I know it is often wrong—it frequently overrules me. And yet, notwithstanding its mistakes, that in the past at least (for of the present it is not fitting that I should speak) it has proved worthy of its high trust, the common judgment of thoughtful men the world over affirms. Better, far better, to suffer the injuries which come from its occasional mistakes than the marvelous wrong which would flow from the attempt to settle all questions of right and wrong of power or the lack of power, by the mere matter of numbers or the accumulation of majorities.

"It has been well said that in an early day John Marshall took the Constitution, penned by the marvelous genius of Madison and Hamilton, and stamped upon it in large and luminous letters the single word 'Nation.' That word is to-day the great interpreter of our Magna Charta. True, to make it indelible cost a war, but the martyr blood of him whose birth we this evening commemorate transcribed it from written instruments to loving hearts and into the life this republic, and now so long as the United States endures—

"O'er all this land one flag shall float,
One song ascend from every throat,
That flag the banner of the free,
That song the song of liberty.

Source of Present Strain.

"No one can fail to discern that the great strain through which this nation is now to pass in its political and judicial life springs not from the conflicting relations of the national government to the States. Those have been settled by the war. The strain will come from the fact of our rapidly increasing population, and the struggle to throw off all constitutional guarantees of protection to liberty and property as more restraints on the so-called liberty of the many. In the presence of this strain I invoke the thoughtful attention of every man to the oath which each justice of the Supreme Court must take:

"'I,———, do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as justice of the Supreme Court according to the best of my abilities and understanding, agreeable to the constitution and laws of the United States. So help me God.

"God forbid that any man elevated to a position on that bench should ever prove recreant to the solemn obligations of that oath, taken on earth, but recorded in heaven.

"It is a curious anomaly of the present day that from some in this land we hear the feverish cry of 'Down with the courts and let the will of the temporary and shifting majorities settle all questions of power and right,' while at the same time from others come an earnest call for the adjustment of disputes between nations through the peaceful processes of arbitration. Courts for disputes between nations, but no courts for disputes between the government and individauls—between the majority and the minority. These dissonant voices only accentuate the fact that within our heterogeneous body politic there are depths as well as heights.

Criticism of Supreme Court.

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.

"I remember seeing in an eastern paper immediatly after the decision in the well-known income tax case a most extravagant eulogy upon the Supreme Court as the great defender of the rights of the few States against the many, and of the accumulation of proverty against

unconstitutional assaults. And when thereafter by that court the act of congress denouncing all contracts, combinations and conspiracies in restraint of trade was held applicable to a combination between railroads to prevent competition in rates, that same paper contained an article expressing the most extraordinary surprise that men supposed to be of ordinary intelligence could be guilty of such a stupid blunder.

" The one article could be condensed in a single clause, ' A Daniel come to judgment; yea a Daniel ! ' and the other in the equally short and expressive pharse, ' An ass within a lion's skin.' Now, it is the inalienable right of every American citizen, according to the peculiar construction of his organs of hearing, to recognize in the judgments of that court either the voice of a Daniel or the braying of an ass.

Confidence in the People.

" It is often said that the courts act as though they had no confidence in the people. But surely that is grievous misunderstanding of the truth. On the contrary, they have the most abounding confidence. They believe that when the people framed the organic law they meant that it should be the measure of all rights and the limitations of all powers, and when they intrusted to the courts the duty of determining whether any single act conflicts with that organic law they meant that those courts should discharge that duty in the fear of God and according to their unbiased and deliberate judgment. They have abundant confidence that the people will honor them for their loyalty to this duty in the face of all opposition and denunciation, and he in the long run will alone receive honor at their hands who in every time of question and excitement stands firm by his convictions.

" A judge is not indifferent to popular approval, but it is that approval which comes at the last, and not at the first thought. Never was there a grander judicial utterance than that which fell from the lips of Lord Mansfield as an excited populace surged up against the gates of Westminister demanding a judgment according to their notions. ' I wish popularity, but it is that popularity, but it is that popularity which follows, and not that which is run after. It is that popularity which sooner or later never fails to do justice to the persuit of noble ends by noble means.' And to-day, despite all tumultuous and passionate cries, it is as certain as holy writ that that judge will be forgotten who simply bends the eager ear to catch the rumbling of the popular voice, while the immortal laurel waits for him who has the unfailing courage of his convictions, and who fearlessly asks only the single questions, What saith the Constitution ?

Blessing or Clamor.

" Do not be discouraged. Let not the noise and confusion which prevail in the low lands of our political life alarm you. We are a

garrulous people. In the valleys is the endless gabble of the demagogue, the cry and tumult of temporary passion. It is not portentous of evil, but, on the contrary, prophetic of good. Let every individual thrust into the seething mass of public opinion his own views of what ought and what ought not to be done. Let the clamor go on. It is a blessed thing—blessed in every direction. It relieves the blatant whose stomach is always full of wind, and the great public discussion will surely separate the wheat from the chaff, sift the wisdom from the folly and finally work out that which is best for all.

"I have abiding faith in the judgment of the American people. Above the valleys of political clamor and noisy strife I see rising in unchanging stability the rock-ribbed mountain peaks of calm, deliberate judgment. And so sure as the mountains endure, so sure will the sober second thought prevail. The confusion of tongues will some day end. The speech at Gettysburg will remain an undying prophecy: 'Government of the people, by the people, and for the people shall never perish from the earth.'

Democracy and Niagara.

"That grim and cynic Scot, Thomas Carlyle looking at the tumultuous movements which so often sweep through this land of government by the people and of the people sneeringly remarked that democracy was shooting Niagara. He saw in those movements only a flood which was sweeping law and order and the foundations of society onward to the brink of a destroying precipice. But Niagara presents two visions: You stand on the bank and you see an angry flood sweeping onward, and bearing everything on its bosom to the fearful and fatal jump. It is emblematic and symbolic of destruction. You turn your eye in the other direction and you see that mighty flood subdued by the hand of man to the dominion of law, and its awful energies transmuted into electric force, which is borne to the neighboring cities, giving them ceaseless light and regulated power.

"So it is with the tempestuous democratic flood. Unrestrained, unchecked, it will sweep onward, bearing all thing to certain destruction; but subjected to restraining law, its tremendous and irresistible force will be transmitted into beneficent light and power to illumine the upward ways of humanity, and strengthen every effort for the bringing in of that millenial day when peace and prosperity shall enfold the earth with glory."

REVIEWS.

General Digest, American and English (Quarterly advance sheets with supplement) No. 6, for January 1898: (subscription 4 dollars a

year) published by *The Lawyers' Co-operative Publishing Company, Rochester, New York*:—This is a publication which we feel bound to introduce to the attention of our readers as the very perfection of a digest. Even for an enterprising country like America the series of digests published under this name by the Lawyers' Co-operative Society must be regarded as magnificent feats of enterprise in the field of law digests. Whether regard is had to the enormous mass of the decisions digested, or to the success attained in the art of condensation or to the facilities provided for referring to connected cases, these publications are entitled to take the first rank among legal digests. Each quarterly digest is a handsome, well printed pamphlet of about 800 pages or more and covers 4 to 8 thousand cases. The digest is also issued in a permanent form every year and embodies all the cases in the quarterly digests. It contains an epitome of all American and English cases, and digests and cites all reported cases in the official reports, in the American case-reporting periodicals and in the English and Canadian reports, and our readers may form an idea of the stupendousness of the task when they are told that the number of publications digested is about a hundred and ten. One of the greatest merits of the Digest is that the points decided are stated in as clear and terse a form as possible and are not complicated by long and involved statements of facts and findings, as is the case in all the law reports and digests that we are familiar with in India and in England. The editors of the Digest do not, like the editors of English and Indian digests, copy the head-notes of cases, but state the principles decided in the form of neat compendious propositions. Underneath each case is given a reference to the cases cited, distinguished, over-ruled and followed. Cross-references are made from all possible subjects and the classification is consistently kept up in all the volumes. Every conceivable labour-saving device has been adopted and the editors are striving to make it more and more perfect every day. The latest and most important improvement consists in the system of annotation which has been adopted. The most important propositions from current decisions are annotated by citation of the leading cases upon the point involved, showing the cases to similar effect or at variance. The Digest is as accurate as it is comprehensive, and considering its utility, is really inexpensive. The price of the annual digest is 6 dollars and entitles the subscriber to the quarterly advance sheets also which, if separately purchased, cost 4 dollars a year.